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PREFACE TO THE THIRD EDITION.

THE present Edition has been prepared for the Press, and all additions necessary to embody the latest rulings of the English and Indian Courts have been made, by Mr. F. S. COLLIS, who was good enough, in the unavoidable absence of the authors of the work, to undertake the task. Their best thanks are due to him for the ability and diligence with which he has fulfilled it.

H. S. C.

H. H. S.

1st September, 1878.

LIST OF ABBREVIATIONS,

A. & E.	Adolphus and Ellis's Reports, K. B.
Add. on Cont.	Addison on Contract.
Aleyn.	Aleyn's Reports, K. B.
App. Ca.	Appeal Cases.
Atk.	Atkyn's Reports, Chancery.
B. & A., <i>or</i> Ad.	Barnewall and Adolphus's Reports, K. B.
B. & Ald.	Barnewall and Alderson's Reports, K. B.
B. & C.	Barnewall and Cresswell's Reports, K. B.
B. & P.	Bosanquet and Puller's Reports, C. P.
B. & S.	Best and Smith's Reports, Q. B.
Beav.	Beavan's Reports, Rolls Court.
Benj.	Benjamin's Treatise on Sale.
Benj. on Pers. Prop.	Benjamin on Sale of Personal Property.
Bing.	Bingham's Reports, C. P.
Bing. N. C.	Bingham's New Cases, C. P.
Black. Com.	Blackstone's Commentaries.
Black H.	Henry Blackstone's Reports, C. P.
Bligh.	Bligh's Reports, House of Lords.
B. L. R.	Bengal Law Reports.
Bl. W.	Sir William Blackstone's Reports, K. B.
Bomb.	Bombay High Court Reports.
Br. & Bing.	Broderip & Bingham's Reports, C. P.
Bro. C. C.	Brown's Chancery Cases.
Brow. & Lush.	Browning and Lushington.
Burr.	Burrow's Reports, K. B.
Byles	Byles on Bills.
Cal. L. R.	O'Kinealy's Calcutta Law Reports.
C. & P.	Carrington and Payne's Reports, N. P.
Camp.	Campbell's Reports, N. P.
Carthew.	Carthew's Reports, K. B.
C. B.	Common Bench Reports.
C. B., N. S.	Common Bench, New Series.
Ch. R.	Chancery Reports.
Chitty.	Chitty's Reports, Bail Court.

CL. & Fin.	Clark and Finnelly's Reports, House of Lords.
Coke	Coke's Reports.
Col.	Collyer's Chancery Cases.
Co. Lit.	Coke on Littleton.
Contrat de Vente	Pothier's Contract of Sale.
Cowp.	Cowper's Reports, K. B.
Cox.	Cox's Reports, Chancery.
Cr. & M.	Crompton and Meeson's Reports, Ex.
C. Rob.	Christopher Robinson's Reports.
De G. & J.	De Gex and Jones's Reports, Chancery.
De G. & Sm.	De Gex and Smale's Reports, Chancery.
De G. J. & S.	De Gex, Jones and Smith's Reports, Chancery.
De G. M. & G.	DeGex, Macnaghten and Gordon's Reports, Chancery.
Doug.	Douglas's Reports, K. B.
Dow.	Dow's Reports in Parliament.
Dow. & Ry., or D. & R.	Dowling and Ryland's Magistrates' Cases.
Dowl.	Dowling's Reports.
Dr. & Sm.	Drewry and Smale's Reports, Chancery.
Dunlop	Dunlop, Bell & Murray's Reports, Court of Session.
E. & B.	Ellis and Blackburn's Reports, Q. B.
E. & E.	Ellis and Ellis's Reports, Q. B.
East	East's Reports, K. B.
E. B. & E.	Ellis, Blackburn and Ellis's Reports, Q. B.
Esp.	Espinasse's Reports.
Ex.	Exchequer Reports.
Fry on Spec. Perf.	Fry on Specific Performance.
Giff.	Giffard's Reports, Chancery.
Gow on Part.	Gow on Partnership.
Hagg. Cons.	Haggard's Consistory Cases.
H. & C.	Hurlstone and Coltman's Reports, Ex.
H. & N.	Hurlstone and Norman's Reports, Ex.
Hardre.	Hardre's Reports, Ex.
Hare	Hare's Reports, Chancery.
H. Bl.	Henry Blackstone's Reports, C. P.
H. L. C.	Clark's House of Lords' Cases.
I. L. R., All.	Indian Law Reports, Allahabad.
Bom.	Bombay.
Cal.	Calcutta.
Mad.	Madras.

Ir. Ca.	Irish Cases.
J. & Lat.	Jones and Latouche's Reports, Chancery.
J. & W., or Jac. & W.	Jacob and Walker's Reports, Chancery.
John. & H.	Johnson and Hemming's Reports, Chancery.
Johns.	Johnson's Reports, Chancery.
Jur., N. S.	Jurist, New Series.
Just. Inst.	Justinian's Institutes.
K. & J.	Kay and Johnson's Reports, Chancery.
Kay	Kay's Reports, Chancery.
Keen	Keen's Reports, Rolls Court.
Kent	Kent's Commentaries on American Laws.
Knapp, P. C.	Knapp's Reports, Privy Council.
Lang. Cont.	Langdell's Cases on Contracts.
Leake on Cont.	Leake on Contracts.
Ld. Raym.	Lord Raymond's Reports, K. B.
Lev.	Levinz's Reports, K. B.
L. J.	Law Journal.
L. J., Ad.	Law Journal, Admiralty.
C. P.	Common Pleas.
Ch.	Chancery.
Ex.	Exchequer.
Q. B.	Queen's Bench.
L. R.	Law Reports.
L. R., C. C.	Law Reports, Crown Cases.
Ch.	Chancery Appeals.
Ch. D.	Chancery Division.
C. P.	Common Pleas.
E. & I. A.	English and Irish Appeals.
Eq.	Equity.
Ex.	Exchequer.
Ex. D.	Exchequer Division.
H. L. C.	House of Lords' Cases.
I. A.	Indian Appeals.
P. & M.	Probate and Matrimonial.
P. C. C.	Privy Council Cases.
Q. B.	Queen's Bench.
Q. B. D.	Queen's Bench Division.
S. C., I. A.	Same Case, Indian Appeals.
Sc. App.	Scotch Appeals.

L. T., N. S.	Law Times, New Series.
M. & G.	Manning and Granger's Reports, C. P.
M. & K.	Mylne and Keene's Reports, Chancery.
M. & M.	Moody and Malkin's Reports, N. P.
M. & S.	Maule and Selwyn's Reports, K. B.
M. & W.	Meeson and Welsby's Reports, Ex.
Mac. & G.	Macnaghten and Gordon's Reports, Chancery.
Macq. H. L. C.	Macqueen's Scotch Appeal Cases.
Mad. H. C.	Madras High Court Reports.
Mer.	Merivale's Reports, Chancery.
M. I. A.	Moore's Indian Appeals.
Moo. & Rob.	Moody and Robinson's Reports, N. P.
Moo. P. C.	Moore's Privy Council Cases.
My. & Cr.	Mylne and Craig's Reports, Chancery.
Phill.	Phillip's Reports, Chancery.
P. Wms.	Peere William's Reports, Chancery.
Q. B.	Queen's Bench Reports.
Rep. in Ch.	Reports in Chancery.
Rob. Ad.	Robinson's Admiralty Reports.
Rose.	Rose's Reports, Bankruptcy.
Russ.	Russell's Reports, Chancery.
Ry. & M.	Ryan and Moody's Reports, N. P.
Saund.	Saunders's Reports, K. B.
Sav. P. I. L.	Savigny's Private International Law.
Scott	Scott's Reports, C. P.
Sh. & Dun.	Shaw and Dunlop's Reports, Court of Session.
Shep. Touch.	Shepherd's Touchstone.
Sim.	Simon's Reports, Chancery.
Sm. L. C.	Smith's Leading Cases.
Stark.	Starkie's Reports, N. P.
St. Conf.	Story's Conflict of Laws.
St. on Ag.	Story on Agency.
St. on Bail.	Story on Bailment.
Stor. Eq. Jur.	Story's Equity Jurisprudence.
Str.	Strange's Reports, K. B.
Sugd. V. & P.	Sugden's Vendors and Purchasers.
Swanst.	Swanston's Reports, Chancery.
T. & R.	Turner and Russell's Reports, Chancery.
Taunt.	Taunton's Reports, C. P.

LIST OF ABBREVIATIONS.

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T. R.	.	.	.	Term Reports (Durnford & East, K. B.)
Vern.	.	.	.	Vernon's Reports, Chancery.
Ves. Jun.	.	.	.	Vesey, Junior's Reports, Chancery.
Ves. Sen.	.	.	.	Vesey, Senior's Reports, Chancery.
W. & T. L. C.	.	.	.	White and Tudor's Leading Cases.
W. Bl.	.	.	.	Sir William Blackstone's Reports, K.B.
Wms. Ex.	.	.	.	William's Law of Executors.
Wm.'s Saund.	.	.	.	Saunders's Reports, edited by Williams.
Y. & C.	.	.	.	Younge and Collyer's Chancery Cases.

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INTRODUCTION.

THIS Act is the latest and most important instalment of substantive law, prepared for British India by the Indian Law Commissioners. Some points in the original Bill gave rise to prolonged discussion, and portions of the measure were re-cast in this country. It consists almost exclusively of the rules which govern the English Courts, thrown into the form of legal enactment. Whenever these rules have been departed from, it has been on account of some difference between the circumstances of the two countries, which rendered it unsafe, in the opinion of those upon whom the responsibility of passing the measure ultimately devolved, to enact the English law without modification. Some special and subsidiary chapters of the Law of Contract, such, for instance, as the Law of Master and Servant, Landlord and Tenant, Consignor and Carrier, the law regulating Promissory Notes and Bills of Exchange, have been intentionally omitted, not that these topics do not require express enactment, but because, when the Act was passed, they had not received that elaborate consideration which their importance deserved, and because, in the case of some, matters of principle had to be decided, the discussion of which was still unripe. The Law of Contracts specially affecting land,—sales, mortgages, leases and other forms of alienation of immoveable property,—has, also, been left aside, as of so special and technical a character, and so diverse in its aspects in different parts of the Empire, as to render it unsafe to deal with it in a general enactment. The general principles, however, laid down in the earlier portions of the Act are applicable to these as to other contracts. The subject of specific performance has also been omitted, no doubt, because, intimate as is its connection with the Law of Con-

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tracts, it lies somewhat beyond the pale of Contract in its strict sense, and involves the consideration of topics with which the Law of Procedure, rather than the Law of Contract, is concerned.

2. The eleven chapters of which the present Act consists may be conveniently summarized by saying that the first six lay down the general principles on which all contracts are based, while the rest of the Act treats specially of the five most important classes of Commercial Contract, *viz.*, Sale, Indemnity and Guarantee, Bailment, Agency, and Partnership. This second part of the Act is thus capable of expansion, whenever it appears desirable to provide specially for any additional subject, without injury to the general symmetry of the Act.

3. The definitions are so framed as to follow out the course of a contract from first to last, and to supply an analysis of its component parts.

The essential idea of all contract being that two or more persons establish relations between themselves, other than those relations which the law creates for them, the first step towards a contract is for the parties to get into communication with each other. This is done by one of them

making a proposal to another. If the meaning of a 'proposal' be analyzed, it will be found to consist of an intimation by one person to another of his willingness to do or to abstain from doing something, made with a view to obtaining the assent of that other person to that act or abstinence. There must be an offer to do or not to do something, and that offer must be made for the purpose of being agreed to. If one man informs another that he is ready to do a particular act, this may be a threat, or a mere statement of fact about himself, as, for instance, 'I should like to kill you,' or 'I am willing to die for my country;' it is not a proposal unless it is made with the view of obtaining the assent of the party addressed. Thus, 'I am ready to marry you,' or

'let us die for our country,' are proposals, inasmuch as they are made with that view.

4. The next step is, that the person, with a view to whose assent the proposal is made, should
 Assent. express his concurrence in the act or abstinence proposed. When this is done, the proposal becomes a 'promise,' and a relation is established
 Promise. between the person making the proposal, who is now called the 'promisor', and the person to whom it is made, who is called the 'promisee': the foundation is thus laid for a right on the one hand and a duty on the other. The nature, extent, and results of these rights and duties it is the province of the Law of Contracts to define.

5. It generally happens that the man who makes a promise to another, does so with a view
 Consideration. S. 2. to some advantage which that other person is capable of conferring upon or procuring for him.* The promisee either does or promises to do something which the promisor wants to be done; or he abstains or promises to abstain from something which the promisor wants not to be done; or he has, previously to the promisor's promise, but at his desire, so done, abstained, or promised to do or abstain. This act, abstinence or promise is the motive of the promisor's promise, and is defined as the 'consideration' for it. For instance, A, in consideration of B delivering certain goods, promises to pay him a certain price: here, the delivery by B is the consideration for A's promise: or A, in consideration of B's abstaining from suing him, promises to pay the debt with 10 per cent. interest a month hence: here, B's abstinence is the consideration for A's promise: or again, A asks B to take care of his child, and B does so: subsequently, A, in consideration of B's having done as he requested, promises him Rs. 1,000: here, something done by B at A's request, previous to B's promise, is the consideration for it. The existence of some one of these

different kinds of consideration is, as will be seen hereafter, one of the essentials of a valid contract.

6. Since, by the definition, a promise involves the assent of the promisee, it follows that every promise is an 'agreement,' and when

Agreement.
Reciprocal Pro-
mises.

S. 2. the consideration for a promise is another promise, the agreement consists of a set of promises, each one being the consideration for the other. Thus, an agreement to sell and purchase goods on credit consists, when analyzed, of a promise on the part of the seller to deliver the goods on the terms stated, and of a promise on the part of the buyer to pay for them at the stipulated time. Each of these promises is the consideration for the other, and, in such a case, the promises are said to be 'reciprocal.'

7. The first great distinction between various sorts of agreements arises out of the question whether they are legally enforceable or not. Numerous agreements are, as will be seen hereafter, discountenanced by the law on moral, political or social grounds; and the law refuses to enforce them. Such agreements are said to be 'void;' such, on the other hand, as are by law enforceable, are defined as 'contracts.' This employment of the word 'contract' is new and arbitrary; but its convenience will be appreciated as we proceed with the further consideration of the Act.

An agreement which, from the circumstances of the

case, is enforceable by one of the parties to it but not by the other, is called a 'voidable' contract.

Voidable con-
tract.
S. 2.

8. What then are the qualifications necessary in order to render an agreement enforceable,—in other words, to constitute it 'a contract'?

Essentials of a
contract.
Ss. 10, 11.

They may be stated thus. In order to be a contract, an agreement (1) must be made by the free consent of the parties; (2) those parties must be competent to contract; (3) the consideration for the agreement must be lawful; (4) the object of the agreement must be law-

ful; (5) it must not be of the classes of agreements which are expressly declared by the Act to be void; (6) it must not contravene any law in force in British India, by which any contract is required to be made in writing, or in the presence of witnesses, or any law relating to registration.

9. These points are next specifically dealt with. First, Competent person. S. 11. we have a definition of a 'competent person,' viz., a person who is (1) of the age of majority according to the law to which he is subject; (2) of sound mind; and (3) not disqualified by any law to which he is subject, as, for instance, in the case of a wife governed by English law, during her marriage, or of an alien prohibited by the law for the time being from contracting, or of certain persons who are specially disqualified, such as the king of Oudh.

10. We next have a definition of 'sound mind,' as Sound mind. S. 12. being the state of mind of a person who, at the time when he makes a contract, is capable of understanding it and forming a rational judgment as to its effects on his interests. A person is not incompetent to contract because he is usually of unsound mind, if at the time of making the contract he is of sound mind; and, on the other hand, a person usually of sound mind would be incompetent to make a contract at any time when he happened to be of unsound mind, as, for instance, during intoxication. The point to be looked at in each instance is the contracting party's capacity, at the particular time, to know what he was about and how the transaction would affect his own interests.

11. Having thus defined 'competent parties,' we next come to analyze the meaning of 'free consent.' Free consent. S. 14. In the first place, free consent is said to take place when 'two or more persons agree upon the same thing in the same sense;' that is, there must be one thing about which they consent; so that two persons who have been, from mistake, agreeing with one another about different things described by

the same name, have never made any agreement at all. As, for instance, when two persons entered into an agreement as to the purchase of a cargo to arrive by a particular ship named *Peerless*, and it turned out that there were two ships of this name, and that the *Peerless* about which one of the parties was speaking was a different ship from the *Peerless* of which the other spoke, there was held to have been no assent, since, for assent, it is essential that there should be something more than a mere verbal coincidence of terms: in order to constitute such assent as is necessary for a contract, it must be shown that the minds of the parties did really concur in the matter with which it deals. In applying this rule, however, consideration must be had to the principle of law which precludes a person from asserting that his meaning was something different from that which his words distinctly show it to have been; and, in the case of written agreements, to that rigid rule of interpretation, which precludes a party to a written agreement from adducing evidence other than the document itself for the purpose of showing that it meant something different from what is expressed in it.

12. Next, in order that there may be a contract, not only must there be consent, but that consent must be free. It becomes necessary, accordingly, to ascertain the circumstances under which consent is not free. These circumstances fall under five heads. In the first place, consent is not free if it is caused by 'coercion,' and coercion is defined as the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining or threatening to detain any property, to the prejudice of a person, with the intention of causing any person to enter into an agreement. In these cases there is a clearly-marked, undisguised interference by one person with the exercise of another person's will, and this interference is effected in the most palpable manner. A man who, under compulsion of some wrong

Free consent.
S. 14.

Coercion.
S. 15.

done or threatened to his person or goods, or to the person or goods of some one in whom he is interested, is induced to express assent, does not, it is clear, in so doing, express his real wish and intention. His consent, accordingly, has not been 'free,' and there has been no contract.

13. The only points to which it seems necessary at present to allude in reference to 'coercion,' are, first, that, in order to constitute it, it is not essential that the person injured, or threatened with injury, should be the same as the person induced by the injury or threat to agree; and, secondly, that, as the Penal Code embraces generally every act, by which one person can illegally harm another, except unlawful detainer of property, and unlawful detainer is expressly mentioned, the section appears to embrace every conceivable form of improper pressure which can be brought to bear by one person on another. Of course threats of legal means of annoyance, such, for instance, as a threat of going to law, however disagreeable, are not 'coercion.' Coercion, as here defined, differs altogether from the compulsion which will preserve certain acts from being criminal under Section 94 of the Indian Penal Code, in order to constitute which it is necessary that there should be threats reasonably causing an apprehension of instant death.

14. But there are other ways of interfering with the free exercise of a person's will, which, though less undisguised and explicit than coercion, are none the less conducive to the same result. In the different relations of life, persons are frequently so circumstanced in reference to each other as to give the one an ascendancy, more or less complete, over the other's mind and will. There are cases, for instance, in which one person places confidence in another, and, so far, submits his own judgment to that other's superior skill, knowledge or experience: a doctor with his patient, a solicitor with his client, a spiritual adviser with the person who

Essentials of coercion.
 Undue influence.
 S. 16.

comes to him for advice, a trustee with his *cestui que trust*—have all a certain decree of confidence reposed in them, and the influence which they exercise is in proportion to the confidence reposed. Again, there are cases where one person exercises authority over another; and this authority, whether real or apparent, so far as it is submitted to, interferes with the freedom of the will of the person so submitting. Parents and children, guardians and their wards, masters and their pupils, stand in this relation to one another.

15. The authority may not be one which is commonly and legally recognized, as, for instance, that exercised by a parent over a child who has reached majority; but it may be none the less effectual in restraining another's will. So, also, it is easy to conceive a case in which, where a rich, powerful proprietor had dealings with ignorant and subservient tenants, his 'apparent authority' would virtually rob the other parties to the transaction of all real freedom of choice. In all these cases, wherever the superior position of the one party has been used for the purpose of obtaining an advantage over the other, which he could not otherwise have obtained, the law declares that there has been 'undue influence,' and, consequently, that the consent obtained by that undue influence has not been free.

16. In the next place, there is 'undue influence' whenever advantage is taken of a person whose mind is enfeebled by old age, illness or distress, mental or bodily, so as to make him consent to that to which he would not otherwise have consented. An agreement forced upon a person distracted by pain, prostrate with illness or sorrow, or unnerved by terror, would, accordingly, be lacking in 'freedom of consent.' 'Undue influence' differs, it will be seen, from coercion, in the respect that 'coercion' is mainly of a physical, 'undue influence' of a moral character. In both alike the freedom of the will is impaired.

17. The English Courts have gone great lengths in the application of the doctrine that 'undue influence' invalidates an agreement. Thus, ^{Mental dis-} ^{treas.} a father who has been forced into an agreement by the fear of a criminal prosecution impending over his son, has been considered as acting under such compulsion as to be no longer a free agent. So, also, it has frequently happened that an usurious transaction entered into by a young man who has borrowed upon the security of his expectations, has been set aside, notwithstanding that the young man was of age, on the ground that it disclosed an unconscientious use of the power arising out of the circumstances and conditions of the parties, there being 'weakness on the one side; extortion, or advantage taken of that weakness, on the other.'

18. There is also another class of circumstances which ^{Fraud and mis-} ^{representation.} has the effect of preventing consent from being free, and, so, the agreement in which it has resulted, from being enforceable; those, namely, in which, though there has been neither coercion nor undue influence, the one party has been induced to consent by a misapprehension for which the other is more or less responsible. This class of cases is divided into two heads, according to the culpability attaching to the person from whom the misapprehension originates: 'fraud' being the term for those cases in which there is some real culpability and a dishonest intention; 'misrepresentation' being the term when there is no dishonest intention, and little or no culpability. The general effect of each, however, is that the consent produced by it is not 'free,' and the agreement, consequently, unenforceable. The details of this general rule will now be considered.

^{Fraud.} ^{S. 17.} 19. In order to constitute fraud, there must be either—

- (1) The suggestion of a fact as true by one who does not believe it to be true; or

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- (2) Active concealment, *i. e.*, something actually done for the purpose of concealment of a fact; or
- (3) A promise made without any intention of performing it; or
- (4) Some other act fitted to deceive, or
- (5) Some act or omission, specially declared by the law to be fraudulent.

It is necessary, too, in order to constitute fraud, that the act should, in each instance, be done by a party to the contract, or his agent, or with his connivance, and that it should be done with the intention, either (1) to deceive another party to the contract, or (2) to induce him to enter into the contract. Whenever these various conditions exist, there has been 'fraud'; and if the fraud has caused the contract, the contract is, as a general rule, voidable at the option of the party on whom the fraud has been practised. If, however, the facts are such that the fraud cannot be said to have been a proximate and determining ground of the transaction, the mere fact of there having been fraud does not, *per se*, render the contract voidable.

20. The second form of fraud mentioned in the preceding list was active concealment. There is a marked difference between this and mere silence. It is one thing to take active measures to hide a blemish, or to deceive a purchaser as to the quality of goods sold: it is another merely to keep silent about facts which it may concern the other party to know, but about which he does not happen to enquire. Here, the question whether silence is fraudulent or not depends entirely on the relation of the parties: traders, for instance, as a general rule, deal with each other at arm's length, and are understood to be under no obligation to volunteer information about the matter of the contract. On the other hand, there are cases where it is the duty of each party, not only to tell the truth, but to tell the whole truth, and where, accordingly, the mere failure to mention a fact may constitute fraud. Transac-

Fraudulent
concealment.
S. 17.

tions which are based, not on the knowledge or judgment of the parties, but on mutual confidence-dealings—for instance, between a parent and child, a guardian and ward, a marine insurer and the underwriter—proceed on the basis that each party is bound to tell the other all he knows, and any failure to comply with this duty would render the contract voidable.

21. There are cases, however, where, although it is the party's duty to speak,* and although, consequently, his silence is fraudulent, yet the fraud does not render the contract voidable.

**Fraudulent
silence not al-
ways a ground of
avoidance.**

S. 19.

This is so, when the party who has been misled by the silence of another had the means, with ordinary diligence, of discovering the truth. This is the only exception to the general rule that fraud renders a contract voidable at the option of the party deceived. Where a distinct mis-statement has been made, or fraud of any other kind has taken place, it is immaterial whether the party deceived had the means of knowing the truth or not: the contract in any case will be unenforceable against him.

22. In the next place, it is possible that one party to a contract may mislead another unintentionally, and be guilty, in so doing, of nothing more than inadvertence. This class of cases is described as 'misrepresentation.' Under it are placed—

**Misrepresent-
ation.**

S. 18.

- (i) The positive assertion, in a manner not warranted by the information of the party making it, of that which is not true, although he believes it to be true;
- (ii) Any breach of duty which, without an intent to deceive, gains an advantage for the party committing it, by misleading another to his prejudice;
- (iii) The causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

23. As to the first of these three heads, it will be observed

that a party may believe what he says, and so have no intention to mislead, and yet be guilty of misrepresentation, if the positiveness of the manner of his assertion is not justified by the degree of information on which he speaks. The fact of the speaker believing what he says is immaterial, if that belief is not based on proper information.

24. The breaches of duty which mislead another to his Breaches of prejudice, to which the second sub-section duty. refers, consist, it is imagined, for the most part, in failures by one party to a contract to make a disclosure, or to give a notice, or to take a precaution, or to observe a formality, the result of which omission is that the other party is misled. Another breach of duty which would fall within the scope of this sub-section would be a failure, through remissness, to undeceive another party who has been misled by a previous unintentional misstatement. Thus, where a man has innocently made a statement which he believed to be true, and afterwards discovers that it is untrue, it is incumbent upon him not to allow the other party to continue in error; and his failure to discharge this duty amounts to a misrepresentation. If any such breach of duty were intentionally committed, with a view either of deceiving the other party, or of inducing him to enter upon the contract, the omission would amount to fraud. There being no dishonest intention, the breach of duty amounts merely to misrepresentation.

25. The third sub-section appears to refer to anything in the conduct of the one party which, Causing mis- the conduct of the one party which, take as to matter accidentally, has the effect of causing the of agreement. other to make a mistake as to the substance of that about which he is contracting. Where the mistake has been of such a nature that the two parties have not 'agreed upon the same thing in the same sense,' there has been, as was pointed out in paragraph 11, no assent at all, and, consequently, no contract would have come into existence. It might be, however, that, though there was no misunderstanding as to the identity of the thing about

which the contract was, yet the one party might unintentionally mislead the other in some particular regarding its substance. If he did so, he would be guilty of misrepresentation within the meaning of the present clause.

26. With regard to this and every form of misrepresentation it will be observed that the main distinction between it and fraud is, that for fraud there must always be an intention either to deceive or to induce the other party to enter upon the contract: whereas, in order to constitute misrepresentation, there need be no deceit or artifice, and no desire or intention to gain any advantage; the fact, therefore, that it took place through ignorance or forgetfulness is immaterial.

27. The effects of fraud and misrepresentation are with one exception identical. Both make the transaction voidable at the option of the person deceived, but if he had the means of discovering the truth, a mere misrepresentation will not avail as ground for avoiding the contract.

28. Persons who have been misled by fraud or misrepresentation are not, however, bound in every instance to avoid the contract. They have another remedy which they are at liberty to adopt. Such a person may, if he pleases, insist that the contract shall be performed, and that he shall be put in the position in which he would have been, if the other party's statements had been true. A party, therefore, who brings about a contract by means of fraud or misrepresentation, is exposed to two risks. He may find himself unable to enforce the contract at all; or he may find himself obliged to go on with it, and to make good the untrue statements by means of which he induced the other party to enter upon it.

29. It sometimes happens that, without there being either fraud or misrepresentation on either side, there will be a mistake. If the mis-

Distinction between fraud and misrepresentation.

Effects of misrepresentation.

Remedy of parties misled by fraud or misrepresentation.

S. 19.

Mistake.

Ss. 20—22.

take is such that the parties are talking and thinking about different things under the same name, no contract has, as we have seen in paragraph 11, come into existence. But there are other mistakes, the effects of which have to be considered. If both parties labor under a mistake as to a matter of fact essential to the agreement, the agreement is void. Thus, if people buy and sell something, supposing it to be in existence, when in reality it has perished, as, for instance, a cargo of goods at sea, the common mistake renders the agreement void. So, where a life-estate is sold, both parties being ignorant of the fact that the tenant on whose life the estate depends is at the time dead, the agreement is a nullity. Erroneous opinions as to the value of the thing about which the contract is made are not, however, allowed to have this effect: nor, if the mistake is about a law in force in British India, will the contract be thereby rendered void. A mistake as to the law of any other country than British India has the same effect as a mistake as to a matter of fact, and, if it is material to the agreement, and both parties labor under it, will render the agreement void. It must be remembered that, in every case, the mistake must be common to both parties: a mistake, however serious, under which one party to the contract only labors, does not as such impair the validity of the contract, though the fact that the one party suffered the other to labor under it may possibly be evidence of fraud or misrepresentation, and so render the contract voidable on that ground.

30. The third and fourth essentials of a contract, mentioned in paragraph 8, are that its 'consideration' and its 'object' should be lawful. Consideration has been already explained in paragraph 5: the 'object' of a contract is that which is promised by the respective parties to it. Where there are reciprocal promises, it is obvious that the thing which, from the one party's point of view, is the object of the promise, is, from the other party's point

Lawfulness of
object and con-
sideration.

Ss. 23, 24.

of view, its consideration : and *vice versa*. Thus, if A agrees to sell a house to B for Rs. 1,000, from A's point of view the sale of the house is the object of the contract and the payment of the Rs. 1,000 is the consideration : from B's point of view, the payment of the Rs. 1,000 is the object of the contract, and the sale of the house is the consideration. As to this matter the general rule laid down by the Act is that, if the consideration, or the object of the agreement, or any part of either consideration or object, or any one of several considerations or objects, is unlawful, the agreement is void. To this general rule there is, as will be seen hereafter, an important exception. We must first, however, ascertain the meaning of 'unlawful.'

Meaning of 'unlawful.'

31. The consideration or object of an agreement is unlawful, if

- (i) it is forbidden by law ; or
- (ii) is of such a nature as to defeat the provisions of any law ; or
- (iii) is fraudulent ; or
- (iv) involves or implies injury to the person or property of another ; or
- (v) is regarded by the Court as immoral, or opposed to public policy.

Every consideration or object, which does not fall within one or other of these categories, is lawful.

32. The first four of the classes just set forth require little explanation. The word 'injury' in class 4 is used, of course, in its strict legal sense, as meaning illegal detriment ; so long as nothing illegal is involved or implied in a contract, its results on the interest of any person would not affect its validity, however disadvantageous to him those results might be. The fifth clause is purposely worded with some vagueness, so as to give the Court, in each instance, a certain discretion as to the contracts which it will allow to be enforced. The decisions of the English Judges have, however, defined with considerable

Agreements immoral or opposed to public policy.

precision the classes of contracts which are to be regarded as immoral or opposed to public policy ; and Indian Courts will, of course, in the absence of express enactment, and where the dissimilarity of circumstances is not so entire as to render any analogy fallacious, be guided by the English rule. Of agreements thus regarded as immoral or opposed to public policy, the most conspicuous are agreements to traffic in public offices, agreements in disparagement of the sanctity of marriage-obligations, agreements for or in promotion of illicit relations between the sexes, agreements having for their object the improper promotion of litigation by parties other than those really interested in the dispute. The limits within which, and the conditions subject to which, agreements of any of the above-named classes are void, will be found discussed at length in the body of the Act.

33. Besides these void agreements, there are certain other classes of agreements which the Act expressly declares to be void. In the first place, an agreement made without consideration is, as a general rule, void. In England the rule of law is, that the fact of an instrument being sealed and delivered is in itself conclusive proof of the existence of consideration, and it is not, consequently, incumbent on the party wishing to enforce a document under seal to prove that there was consideration, nor permissible to the party resisting it to show that there was none. This rule, however, has never been applied to this country, except on the Original Side of the High Courts, and must now be considered as repealed so far as they are concerned. The present Act provides three Exceptions to the general rule, that agreements unsupported by consideration are void. These Exceptions are:—

Agreements
expressly declar-
ed void.
Ss. 25—30.

Agreements
without consi-
deration.
S. 25.

- (i) When the agreement is one made between near relations out of natural love and affection, and is in writing and registered ;

- (ii) When the agreement is to compensate a person who has already done something voluntarily for the person making the promise, or something which the person making the promise was legally compellable to do;
- (iii) When the agreement is to pay a debt, barred by the Limitation Act, but otherwise enforceable, and is made in writing and signed by the party to be charged or his agent.

34. The reason of the rule which prescribes consideration as an essential to a valid contract is, that what a man promises without an equivalent, he probably promises in a rash and ill-considered way and without the degree of deliberation that should attend an irrevocable act. As, moreover, the opposite party gives nothing in return for his promise, he will be no worse off than he was before, if the promisor recalls it; and it is right, therefore, that the promisor should have an opportunity of doing so except in cases where, as in the Exceptions, there are special circumstances attending the promise, which render it natural and equitable that the promise should be made, and improper, therefore, that it should be recalled.

35. The rule as to consideration does not extend to gifts, the validity of which, it is expressly provided, is not to be affected by anything contained in the Act. They will, accordingly, remain, as at present, governed by the Hindu, Mahummadan or other law to which the parties in the case are subject, and a gift, otherwise valid, will not be impugnable on the ground of absence of consideration.

36. Though the law, however, insists on there being some consideration to support a contract, it does not specify how much, nor will it enquire into the adequacy of the consideration, except for the purpose of determining whether the contract was really made with the free consent

of the contracting parties. Where the consideration is grossly insufficient to support the promise, there arises a presumption that the promisor was, in some way or other, not a free agent, and that some improper influence was brought to bear upon him. In deciding whether this was so or not, the amount and character of the consideration may often be important evidence. In every other case it is a matter with which the Court has nothing to do, and into which it will not enquire. No one, it is obvious, but the parties themselves can, as a general rule, form a just estimate of the terms upon which it may have been worth their while to agree.

37. Another class of agreements expressly declared by the Act to be void consists of agreements in restraint of the marriage of any one other than a minor. The well-being of the community is considered largely to depend on marriages following a natural and healthy course; any attempt to interfere with this, or to bind persons to remain in a condition of celibacy, is regarded as contrary to public policy, and agreements which are framed with this intention are, by the present Act, specially declared void.

38. On the same ground the law discountenances agreements in restraint of trade. It is contrary to public policy that any member of the community should cease to have free opportunity of exercising his powers, and using whatever skill, knowledge or experience he may possess, in contributing to the wealth, comfort or well-being of society. Agreements, therefore, which have for their object the general restraint of any person in these respects are declared to be 'to that extent void.' To this general rule, however, there are some important exceptions. The

Exceptions to the general rule. 'good-will' of a business is got together by patience, activity, skill, and, often, at a great expense; and it is only right that the man who has succeeded in forming a connection should gain the full

benefit of his labors by being enabled to sell it for what it is worth when he is no longer desirous of personally carrying the business on. This, however, he would be unable to do, if he might not legally bind himself not personally to engage in a like business. The rule, therefore, has been so far relaxed as to allow a person who is selling the good-will of a business to agree with the buyer not to carry on a like business within specified local limits (which must be such as the Court deems reasonable in respect of the character of the business), so long as the buyer, or any person deriving title to the good-will from the buyer, is carrying on a business of the same description. As to the limits which will be deemed reasonable, a large number of decisions have been passed in the English Courts, and their application will be found discussed in the body of the Act. The general principle upon which they proceed is, that the restriction must not be greater than the protection of the person interested requires, or such as to inflict injury on the public.

39. Another exception to the general rule against agreements in restraint of trade is, that partners in anticipation of a dissolution of partnership may agree that some or all of them will not carry on a business similar to the partnership-business within certain local limits, the reasonableness of which must be decided as in the case of the sale of a good-will. Partners may also agree that, during the continuance of the partnership, they will not carry on any other business than that of the partnership. Were such agreements not lawful, it is obvious that one of the most important provisions of most partnerships, *viz.*, the securing of the exclusive devotion of the partner's time to the partnership-business, would become impossible.

40. Another class of void agreements consists of those by which a man is restricted from enforcing his rights by recourse to the ordinary legal tribunals. Such agreements have been discountenanced by the English Courts on the

Agreements in
restraint of legal
proceedings.
S. 28.

ground that the law will not allow a man to shut himself absolutely off from the benefits of its protection, and lay himself practically at the mercy of the person with whom he has contracted. There is, however, nothing objectionable in parties agreeing that all disputes which may arise between them as to particular subjects, or particular classes

of subjects, shall be referred to arbitration, and that the amount settled in such arbitration, and that alone, shall be recoverable.

There are many matters which, from their intricacy, technicality or other cause, are peculiarly unfit to be adjusted in Courts of law, and which require the less formal investigation which can be secured by a reference to arbitration. Such agreements to refer will be enforced by the Courts, and no other suit can in such a case be brought in respect of the matter of the dispute. Agreements to refer

already existing disputes to arbitration have long been recognized by law, and express provision is made for them in the Code of Civil Procedure.

No question, therefore, as to their legality could be raised.

41. Wagers are discountenanced as of an immoral tendency, and agreements by way of wager are

Wagers.
S. 30.

among those which the Act specially declares void. No suit can be brought, either for anything alleged to be won on a wager, or which has been entrusted to a stake-holder to abide the result of the game or other uncertain event on which the bet depends. A proviso, by way of indulgence to the horse-racing interest, has been added to the section, by which subscriptions

Exception.

to a prize of 500 rupees or upwards, to be given to the winner of a horse-race, are exempted from the general rule which renders agreements of this description void.

42. Another class of void agreements is that of agreements, the meaning of which is not, and cannot be made, certain. The law can

Agreements
void for uncertainty.
S. 29.

only deal with transactions so far as they

are outwardly expressed by the words or conduct of the parties, and if the parties have so dealt with each other as that it is impossible to know with certainty what they meant, the only safe course is to regard the whole transaction as a nullity: the Court cannot conjecture their meaning, nor can make it a contract for them when they have not chosen to do so for themselves: their attempt at a contract has been in fact abortive: the document, the meaning of which is uncertain, has no meaning, and the transaction which is thus uncertainly expressed is, consequently, void.

43. The last class of void agreements to which it is necessary to draw attention, is that of agreements to do something impossible. The law will not lend its aid to enforce bargains which it is physically impossible for the promisors to perform: such an obligation is, and must be regarded as, a mere nullity. An agreement to square the circle, to foretell the future, to find treasure by magic, to do anything in violation of the ascertained laws of nature is, accordingly, void.

44. Sometimes, however, a contract, not impossible at its inception, becomes impossible owing to subsequent events beyond the control of the contracting parties: sometimes, again, a contract lawful in its inception, becomes unlawful owing to some similar cause. A singer, for instance, contracts to sing, and loses his voice through illness; or, again, a war breaks out between the countries in which the contracting parties respectively reside, and all trade is forbidden: in these cases the result of the contract becoming impossible or unlawful is that it becomes void.

45. This provision, however, does not exempt a promisor who knows, or has the means of knowing, that a thing is unlawful or impossible, and contracts with a person who is ignorant of the fact, from his liability to recoup the promisee for any loss arising to him from

Agreement to
do an impossible
act.

S. 56.

Contracts which
become impossi-
ble or unlawful,
and so void.

S. 56. -

Liability of
promisor who
knowingly pro-
mises something
impossible.

S. 56.

the non-performance. The promisor has knowingly chosen to promise to do the impossible or unlawful thing, and he must compensate the promisee for loss accruing to him from the non-performance, as though the performance were possible or lawful.

46. Before quitting the subject of void agreements, it may be well to notice two important Exceptions to the rule mentioned in paragraph 30, that any illegality, either in object or consideration, renders an agreement void. The first

Promise to do legal and illegal thing.

S. 57.

Exception is that, when persons reciprocally promise, firstly, to do something legal, and then, under specified circumstances, to do something illegal, the promise, as regards the legal thing promised, is valid, but, as regards the illegal part of it, it is void. Thus, supposing A to agree to sell a house to B for Rs. 10,000, but that, if the house is used as a gambling-house, B shall pay Rs. 50,000, the sale of the house for 10,000 rupees would be valid; the further provision for payment of Rs. 50,000 in the event of the house being used as a gambling-house would be void. It will be observed, however, that, in this case, part of the consideration and part of the object of each of the contracting parties' promise is illegal. The contingent illegality is, however, simply regarded as a nullity: it does not vitiate the whole transaction.

47. The other Exception to the rule, as to the effects of illegality in the object or consideration of an agreement, comes into force when an alternative promise is made, one branch of which is legal and the other illegal. Here, the

Alternative promise, one branch of which is illegal.

S. 58.

entire agreement does not become void; the illegal branch alone is unenforceable. This provision is borrowed from the English law, and proceeds, no doubt, on the principle that the policy of the law is, so far as may be, to carry people's bargains with each other into effect, and not to allow a partial illegality, which is capable of being separated from the legal portion of the transaction, to operate so as to render the whole unenforceable.

48. We have seen that agreements by way of wager are void. The law does not, however, forbid parties from entering upon contracts so framed as to become obligatory only on the occurrence or non-occurrence of some particular event. It frequently happens that the parties to a contract do not want to create an absolute, unconditional obligation between themselves, but merely to provide that, in case of a particular circumstance occurring, the one shall be bound to do something for the other. They make, accordingly, what are called 'contingent contracts.' For instance, a merchant is going to employ a clerk. So long as matters continue in their present state, he wants nothing more; but he wishes to guard himself against a possible future occurrence, viz., the dishonest behaviour of the clerk: he consequently contracts with a third party that, in case of the clerk's misconduct occasioning him loss, the third party will make it good. This is a contract of indemnity, one of the commonest forms of contingent contract. Or, to take another instance, a merchant, sending a valuable cargo to a foreign country, wishes to guard against the loss which a possible disaster at sea might inflict upon him; he agrees, therefore, with another person that, in case of any such accident occurring, the one shall make it good to the other to an amount specified: this is a contract of marine insurance, another common form of contingent contract. Sometimes such contracts assume a somewhat more complicated form: for instance, the contingency, on the happening of which the person contracting becomes bound to do or not to do the thing agreed, may be the occurrence of something within a specified time, or before the occurrence of some other event. Persons frequently, for example, insure their lives for a particular period, that is, agree that, if they should die within the period named, a sum agreed is to be paid to their representatives; or again, the contingency may be

the non-occurrence of a particular event within a specified time, or before another specified event, as, for instance, A may agree to do something, provided B does not die in the lifetime of C, or does not die previously to D's attaining majority.

49. As to contracts of this description the following Rules as to enforcement of contingent contracts. S. 32. rules alone require notice: first, when the contract is to do or not to do something if a future uncertain event happens, it cannot be enforced until that event has happened;

and if the event becomes impossible, the contract becomes void. A contingent contract, for instance, in which A promised to pay B Rs. 1,000 when B married C, would become void upon C's dying without having been married to B, inasmuch as the event on which the contract depended would have become impossible. But it might also become void by the marriage of either B or C to any one else; for, though it would still be possible that B's wife or C's husband might die, and so a marriage between B and C at some future time again become possible, yet this is not a sort of possibility which the law will recognize; the rule being that, when the event on which a contract is contingent is an act to be done by some person, and that person puts himself in a position which makes it impossible for him to specify any period within which he will do the act, or which makes it impossible that he should do it unless some other event over which he has no control happens, then the event on which the contract is contingent will be regarded as having become impossible, and the contract as having become void.

50. Another rule governing contingent contracts is, that Contracts dependent on non-occurrence of event. S. 35. if the contingency on which the contract is dependent is the non-occurrence of a particular event, the contract can be enforced when the occurrence of the event becomes impossible and not before. If, for instance, A

agrees to pay B Rs. 1,000 in case a particular vessel does not return, the contract is enforceable when it becomes impossible that it should return, as, for instance, by being lost.

51. Lastly, if the contingency on which the contract depends is the occurrence of a particular event within a specified time, the contract becomes void—(1) when the time specified has elapsed without the occurrence of the event; or (2) if, previously to the expiry of the time specified, it becomes impossible that the event should happen. A, for example, agrees to pay B Rs. 1,000 if a certain ship returns within the year: the contract becomes void if either the year elapses without the ship having returned, or if, previous to the expiry of the year, the return of the ship is rendered impossible by its loss.

52. It must be observed, moreover, that the fact of the event on which the contract depends being impossible will render the contract void, whether the parties to the contract are aware of the impossibility or not. A, for instance, might promise B Rs. 1,000 on B's marrying A's daughter. If A's daughter were dead at the time, and the contingency of the marriage thus impossible, the contract would be void, though neither party was aware of her death.

53. From the examples stated above it will be apparent that the contingency on which the contract depends may be something to be done by one of the parties to the contract. In such cases the party on whose act the contract is contingent has it in his power, if he pleases, to render the contract enforceable, or, if he pleases, to keep it in abeyance. Contracts of this nature must be distinguished from those in which there are reciprocal promises by the two parties, the one made in consideration of the other. In those cases there is a mutual obligation:

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here, the obligation may be all on one side ; but the party on whose act the contract is contingent has it in his power, by doing or refraining from the act, to fix the moment at which the contract shall become enforceable.

54. Having now ascertained the elements of which a contract consists, the conditions subject to which it is enforceable, the circumstances under which it is or becomes void, and the contingencies on which it may be dependent, we next proceed to inquire into the mode in which it must be carried out. This brings us to the consideration of the subject of performance. In the first place, the general rule is laid down, that the parties to a contract must perform their respective promises, or must make such an offer of performance as the law considers tantamount to performance.

Performance of contracts.
S. 37.

Parties must perform or offer to perform.

Modes in which performance may be dispensed with.

The right to performance may, however, be superseded in various ways ; sometimes the law releases a person directly from the obligation of performing his promise, as, for instance, when an insolvent is released from paying his debts, or when a transaction involved in the contract is declared illegal ; sometimes the parties agree to put an end to the obligation or to substitute a new one in its place ; sometimes the conduct of one of the parties is such that the other is thereby released from the obligation of performing his part of it. All these modes in which performance may be dispensed with will be considered in detail hereafter. At present it is important to observe that the rule now under consideration creates a definite, legal duty with which all parties to a contract are, subject to certain specified conditions, bound to comply, and which is enforced by the sanction of damages, which the law allows the party injured by a breach of contract to recover against the party committing the breach.

Act imposes obligation to perform promise.

55. We must first ascertain the circumstances under which an offer to perform is tantamount to performance. It will be obvious that, in most contracts, the co-operation of both parties is necessary in order to render performance possible. If one party is to deliver goods, the other must accept them ; if one party is to render services, the other must receive them ; if money is to be paid on the one hand, it must be taken in payment on the other. Supposing, therefore, that one party to a contract is, for any reason, unwilling to accept performance, all that the other can do is to offer to perform, and, having so offered, he is entitled to stand, as regards his own rights under the contract and his power to enforce them, exactly in the same position as if he had performed. In order, however, that an offer of performance may have this effect, it must be—

Offer when equivalent to performance.
S. 38.

Essentials of an offer of performance.

- (i) unconditional ;
- (ii) made at a proper time and place, and under such circumstances as to allow the other party a reasonable opportunity of ascertaining that the person offering to perform is able to perform the *whole* of that which he has promised ;
- (iii) when the offer is to deliver something, the promisee must have a reasonable opportunity of seeing that the thing offered is the same thing as the promisor is bound to deliver.

56. A promisor whose offer of performance made in compliance with these conditions has been declined, is in the same position as though he had performed ; moreover, in the case of a promise made to several joint promisees, an offer of performance made to one of them has the same effect as an offer made to all.

Offer made to one of several promisees.
S. 38.

57. The next point to be decided is, as to the persons on whom the obligation of performing the promise lies. The parties to the contract are, of course, primarily liable; but, as it often happens that a contract is not completed in a man's lifetime, it is necessary to settle what promises lose their obligatory force with the life of the promisor, and what promises are binding on his representatives.

By whom contracts must be performed.
S. 40.

58. The rule as to this is, that a man's promises are binding on his representatives "unless a contrary intention appears from the contract," and this contrary intention is inferred wherever the skill, experience, taste or other personal qualities of the promisor are an essential element in the bargain. If A engages B to paint him a portrait or write him a poem, B, and no one else, must fulfil the promise; and if B dies before fulfilment is complete, B's representatives can neither be compelled to go on with it, nor, on the other hand, can they claim to complete the performance on their side and so entitle themselves to claim performance of the reciprocal promise by the other party.

What promises are binding on promisor's representatives.
S. 37.

59. The same rule applies, during the promisor's lifetime, to promises in which, from the nature of the case, it appears not to have been the intention that the contract should be personally performed. In such cases the promisor may either perform the promise himself, or may employ a competent person to perform it. A man who promises to pay money or to deliver goods to another, fulfils his contract just as effectually by sending his agent with the money or goods, as if he personally made payment or delivery: an author or artist, on the other hand, must himself perform his contract, and cannot do so through the agency of another.

Contracts which need not be personally performed.
S. 40.

60. The promisee may object to such substitution on the ground that the intention was that the contract should be personally performed, or that the proposed substitute is not competent: if, however, he accepts performance from a third party, he cannot afterwards enforce it against the promisor.

Promisee accepting performance from third person cannot object.

S. 41.

61. Sometimes a promise is made by several persons jointly, and in that case it becomes important to determine what precise liability, in the absence of any express agreement, devolves on each of them. The rule is

Liability incurred by joint promisors.

Ss. 42—44.

that all the joint promisors, and, after the decease of any of them, the representatives of the deceased promisor along with the survivors, are bound to fulfil the promise. The promisee in such a

S. 42.

Right of promisee against each joint promisor.

case may compel any one of the joint promisors to perform the whole of the promise. Every joint promise is therefore, under the present Act, presumed to be 'joint and several.' The joint promisor, however, who is so called upon to perform the whole promise, is not without his remedy. He can, in the absence of some express agreement to the contrary, compel every other joint promisor to share equally with himself the

Right of joint promisor to enforce contribution.

S. 43.

burthen imposed by the joint promise; and when one of the joint promisors in such a case makes default, as by becoming bankrupt, the remaining joint promisors must apportion among themselves the additional burthen imposed upon them by the failure of one of their number to perform his share of the common obligation.

62. It may be that the persons who make the joint promise stand to each other in the relation of principal and surety; in that case, if the surety is called upon to perform the promise, he is, of course, entitled to recover

Right of surety against principal.

S. 43.

the whole of it from the principal, as the obligation is, primarily, that of the principal alone.

63. Should the person to whom a joint promise is made choose to release one or more of the persons who join in the promise, the question arises, what the effect of this release is upon the rest. According to the theory of the English Common Law Courts, the obligation incurred by joint promisors is entire, and the release of any one of the joint promisors has the effect of releasing all. The Courts of Equity, however, have devised means for evading this inconvenient result; and the present Act is framed with a similar intention. The release of one joint promisor does not, under its provisions, operate to discharge the other joint promisors, or to affect any rights of contribution which the joint promisors may have as between each other.

64. Sometimes promises are made to several persons jointly, and it is necessary, accordingly, to determine by what rule the rights of such joint promisees will, in the absence of special agreement, be governed. The rule is, that all the persons to whom a promise is made must, during their joint lives, join to enforce it; and that, after the decease of any one of them, his representative must join with the surviving joint promisees in demanding performance. When all the joint promisees are dead, the representatives of all must act jointly.

65. Having now disposed of the persons who are bound to perform the contract and the persons who can claim performance, we come next to the consideration of the time and place at which it ought to be performed. The most important rule as to this is, that performance must be

Effect of release of one of several joint promisors.

S. 44.

Right of joint promisees.

S. 45.

Time and place of performance.
Ss. 46—50.

in the manner and at the time which the promisee prescribes or sanctions: thus, a payment to A may, if he so direct or consent, be made by placing the amount to A's credit with his banker, or by setting-off the amount against a debt due by A to the person owing the money, or by paying the money to some one else. In the same way any delivery of goods, whether to a carrier or wharfinger, whether at one time and place or another, will be good, provided that the promisee direct or consent to it.

Performance may be at time or in manner prescribed by promisee.

S. 50.

66. Supposing, however, that the promisee does not expressly sanction or prescribe any manner of performance, the matter will be governed by the following rules. When the terms of the contract throw it on the promisor to act without application being made in the first instance by the promisee, and when no definite time for performance is fixed by the contract, the rule is that it must be performed "within a reasonable time." What this 'reasonable time' is, will depend, of course, on the special circumstances of each case, and on the facts which were before the parties' minds when the contract was made.

When contract does not fix time.

S. 46.

67. When a day for performance is fixed by the contract, and the terms of the contract are such that the person who has made the promise has to perform it without any demand being made by the opposite party, the rule is, that the promisor may perform the promise at any time during the usual business-hours on the day agreed. The performance must be moreover "at the place at which the promise ought to be performed." This would probably be indicated expressly by the terms of the contract, or would be inferred from the nature of the case. One general rule only as to the place of performance of contracts is given by the Act. In the case of

Rule when a day is fixed for performance, and no application is to be made by the promisee.

S. 47.

Rule as to place of delivery of goods sold.

S. 94.

goods sold, the place of delivery is, in the absence of express agreement, understood to be the place at which they are at the time of the sale, or, if the goods are not in existence at the time of the sale, then the place at which they are produced. In the case of other contracts there will be, in general, little difficulty in ascertaining what is the place at which the promise "ought to be performed."

68. In the case of a contract so framed as to lay upon the promisee the burthen of demanding performance in the first instance, the rule corresponds to that just laid down. The promisee must demand performance within the usual hours of business and at a proper place, and the question as to what is a proper place must depend, in each instance, on the particular facts of the case.

69. The last case is when the promisor is bound by the terms of the contract to perform his promise without any demand being made in the first instance by the promisee, and where no place is fixed by the contract for performance. Here, it is the duty of the promisor to apply to the promisee to fix a reasonable place for performance, and, when this has been done, to perform the promise at the place so fixed.

70. We have seen in the preceding paragraphs by whom and in what manner promises ought to be performed: we have now to consider the effects of non-performance of his promise by one party to a contract, on the rights and obligations of the other party to it. A contract consists, it has been shown, in almost every instance, of reciprocal promises, and these promises are to a greater or less degree inter-dependent, so that a failure to perform on the one side generally justifies a refusal to perform on the other. Much learning has been expended in the English Courts on nice distinctions arising out of the question whether particular conditions were concurrent and independent, so as to allow of

Rule when a day is fixed, but application has to be made by the promisee.

S. 48.

Rule when no place is fixed, and no application by the promisee has to be made.

S. 49.

Effects of non-performance by one party.

Ss. 51—55

the rest of the contract being enforced irrespectively of their fulfilment or non-fulfilment, or whether they were conditions precedent and dependent, so as to necessitate their fulfilment as an essential preliminary to the enforcement of the rest of the contract. Various canons have been laid down for deciding under which of these two categories any particular covenant ought to be placed : but there is scarcely any one of these canons against which some one or other of the decided cases does not, more or less, offend, and the subject cannot be said to be one upon which the various English tribunals have been at all times wholly unanimous. In the present Act the expressions 'condition precedent' and 'condition concurrent' have not been preserved, and the subject is provided for by the following rules. First, when there are reciprocal promises to be

Rule in case of reciprocal promises to be simultaneously performed.

S. 51.

simultaneously performed, the one party to the contract need not perform his promise unless the other party is ready and willing to perform his. A, for instance, contracts to deliver goods to B on payment of the price. Here, there are reciprocal promises : A's, to deliver the goods, B's, to pay the price ; performance is to be simultaneous. Neither of the parties, therefore, is bound to perform on the one side, unless the other party is ready and willing to perform on the other : and non-performance by one party may be successfully defended by showing that the other party to the contract was not 'ready and willing' to perform his part of the bargain.

71. Where the performance of the reciprocal promises is not to be simultaneous, the rule as to the order of their performance is, that they are to be performed in the order expressly fixed by the contract, or, in case no order is expressly fixed by the contract, in the order which the nature of the transaction requires. Supposing, for instance, that A and B contract that A shall make over his stock to B at a price to be paid hereafter, and that B shall

Rule of order of performance of reciprocal promises.

S. 52.

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give a security for the payment: here, though nothing is said as to the order of performance, it is obvious that the intention is that A should get the security before he parts with his stock; and B's promise, therefore, of giving security must be performed before A's promise to deliver the stock. The results of a failure by one of the parties to perform his promise in its proper order upon his rights under the contract as against the other party will be explained immediately.

72. We must first, however, dispose of the case in which

Rule as to one party preventing performance by another.

S. 53.

one party actually prevents the other from performing his part. Whenever this happens, the party so prevented may at once avoid the contract and claim damages from the party preventing him for other loss sustained in consequence of the non-performance of the contract.

73. Not only, moreover, is it the duty of the promisee

Duty of promisee to give reasonable facilities.

S. 67.

not to prevent performance of the promise, but he is bound to give 'reasonable facilities' for its performance; and if he neglects or refuses so to do, the promisor is excused as to any non-performance which may be caused by such neglect or refusal. Suppose, for instance, that A contracts to repair B's house, and that the circumstances of the case are such as to render it reasonable that B should point out the places in which the house needs repair. Here, if B refuses or neglects so to do, and A is thereby unable to make the repairs, B's refusal or neglect will be sufficient excuse for A's non-performance, since B has practically prevented it.

74. This, however, is not the only mode in which one

Rule as to party refusing to perform, or disabling himself from performing, contract in its integrity.

S. 39.

party to a contract may put it in the power of the other to rescind it and sue for damages arising from the non-performance. The same result ensues whenever one of the parties refuses to perform or disables himself from performing the contract in

its entirety. In this case the general rule laid down by the Act is, that the other party to the contract may avoid it and sue for damages for the non-completion of the contract.

Rule as to effect of failure to perform reciprocal promise.

Some practical applications of this rule have now to be considered. There are contracts consisting of reciprocal promises, such that one of them cannot, in the nature of things, be performed till after performance of the other: A, for instance, agrees to load a cargo of goods on a certain ship, and B

Rule where one promise cannot be performed till performance of another.

S. 54.

agrees to send the ship to receive the cargo: or A agrees to work up certain raw materials, which are to be furnished by B: here, performance by A is physically impossible until after performance by B. In all such cases as this, B's non-performance will be a sufficient excuse for non-performance on the part of A; and A will be at liberty to sue B for any loss arising to him from the non-performance.

75. So, again, in the case of reciprocal promises for the performance of which a particular order (as was pointed out in paragraph 71) is either expressly fixed by the contract, or is required by the nature of the transaction, the party who fails to perform his promise

Rule when an order of performance is either expressed or implied.

S. 52.

in its proper order loses his right to enforce the contract, and is liable to be called upon to make compensation to the other for any loss sustained by him owing to the non-performance.

76. The above rules provide, it will have been observed, with great stringency for the effects of default in performance on the one side in disabling the defaulter from enforcing performance on the other. These provisions go considerably beyond the English law, and the result of them appears to be, that any breach, however immaterial, and at whatever stage of completion, committed by one party disables him from insisting on the contract being carried out, and

Stringency of the Act as to results of breach.

justifies the other party in avoiding it. Under the English law, breaches of contract which can be adequately compensated by damages are, as a general rule, ground, not for avoiding the contract, but merely for a separate action

Rule as to
breaches in res-
pect of time.
S. 55.

for damages. In one instance only does the present Act appear to proceed on a like principle, and that is in cases in which a promise has been made to do things at or before a particular date, and a default has taken place in performance within the proper time. Here, the law provides two different courses, according to the view taken of the intention of the parties.

77. On the one hand, there are cases in which, from the nature of the transaction, everything turns on the contract being performed at the precise date agreed upon. A merchant can make use of a certain sum of money if he

Cases in which
time is of the
essence of the
contract.

has it to-morrow; and the day after, the opportunity is gone, and it is useless to him. A shipper can consign goods on favorable terms by a particular vessel, and unless they arrive before she sails the chance is lost. Here, time is, as it is said, 'of the essence of the contract.' Performance is worthless if not in time. On the other hand there are cases in which, though a time for the performance of a promise is mentioned in the contract, it is as a

Cases in which
time is not of
the essence of
the contract.

subsidiary, not as a primary, matter. The performance, not the time of the performance, is the main consideration. A man agrees with a painter to paint his portrait, or with an author to complete a set of memoirs, or with a builder to erect a house. Here, though the painter, or author, or builder may, in each case, promise to get his work done by a particular date, yet his exactness in this particular is not a matter of such essential importance as that the existence of the contract should depend upon it. If the picture, or book, or house, is done within any reasonable time, the contract in all its material parts will have been performed

and the inconvenience or loss occasioned to the promisee by the unpunctuality of performance can be separately appraised. Here, time is not of the essence of the contract. For these two sets of cases two rules are provided by the Act. Where time is of the essence of the contract, and the contract is not performed at the specified time, the contract, so far as it has not been performed, is voidable at the option of the promisee. If, on the other hand, it does not appear to have been the intention of the parties that time should be of the essence of the contract, a failure to perform a promise at or before the specified time does not render the contract voidable by the promisee. Supposing, however, that the delay has occasioned the promisee any loss, he can claim compensation from the defaulter: but, if he intend to make such a claim, he must, at the time when he accepts performance, give notice of his intention to the opposite party.

78. It will thus be seen that, where the breach of contract is as to *time*, the results of the breach will differ according as the consideration of time appears to be, or not to be, of the essence of the contract. If time is not of the essence of the contract—if, that is, notwithstanding the breach, the contract can, in all its substantial requirements, be satisfactorily performed,—the breach will not render the contract voidable, but the party aggrieved will be able to claim damages in a separate action. There is, it is submitted, no reason why this provision as to the effects of a breach in rendering a contract voidable should be restricted to cases in which the breach is as to time. Just as there are instances in which it is not the intention of the parties that time should be of the essence of the contract, so there are cases in which quantity, or quality, or place, or mode of delivery, are not essential; and in these cases the proper remedy would seem to be, not to render the contract voidable, as the present Act apparent-

Different results of a breach as to time and other breaches.

Cases in which quantity, or quality, or place, or mode, are not of the essence of the contract.

ly does, but to allow the party injured to claim damages in a distinct proceeding. If the breach by one contracting party is such as to go to the very root of the contract and render its substantial performance impossible, then the other contracting party ought to be entitled to avoid it; for no compensation will place him in the position in which he contracted to be. If, on the other hand, the breach is not of this essential character, and is not fatal to a substantial performance of the contract, the equity of the case would appear to be more satisfactorily met by allowing the injured party to seek damages for any loss which he has sustained, than by putting it in his power to break off the whole engagement on what may be extremely inadequate grounds. As the Act, however, at present stands, it is necessary to call attention to the extremely serious results of any breach, other than a breach as to time of performance, however insignificant, in enabling the opposite party to avoid the contract if he pleases.

79. The next matter to be dealt with is the position of the parties upon the rescission of a voidable contract by the party having the right to rescind it. Upon such rescission by the one party, the other party is released from the obligation of any further performance under the contract; the rescinding party, moreover, is bound to restore, so far as may be, any advantage which he may have received under the contract.

Duty of party
rescinding a void-
able contract.
S. 64.

80. The same rule applies in the case of an agreement which is discovered to be, or which becomes, void. Any person who has received any benefit under it is bound to restore the benefit or to make compensation to the person from whom he received it.

Duty of party
to agreement
discovered to be
void, or which
becomes void.
S. 65.

81. There is a question connected with the subject of performance of contracts, which often arises when the performance consists in the payment of money, and where there

Appropriation
of payments.
S. 59.

are several debts in respect of which the payment may be made,—namely, to which of the debts is the payment to be appropriated? As to this, several rules are laid down

by the Act. In the first place, a debtor who owes his creditor several debts may, 1st rule. Debtor may appropriate.

either expressly intimate that any payment which he makes is to be appropriated to whichever of the debts he pleases, or he may make the payment under circumstances implying that the payment is so to be appropriated: and in either case; if the payment is accepted, it must be appropriated according to the debtor's intention.

82. The circumstances from which it would be most

Circumstances from which appropriation is to be inferred.

S. 59.

naturally inferred, in the absence of express direction, that a debtor intended that a particular payment should be appropriated to a particular debt, would be

when there is a payment of the precise sum necessary to discharge a debt at the moment when it becomes due, or in reply to a demand for payment. Suppose, for instance, that A owes B Rs. 1,000 on a promissory note which falls due on 1st June, and that on the 1st June A pays to B Rs. 1,000, there can be scarcely a doubt that A's intention was that the Rs. 1,000 should be appropriated to meeting the note, notwithstanding that there might be other debts owing from him to B at the same time. Or, if A owes B, amongst other debts, £150 on some particular account, and B writes to demand it, and A in reply sends £150, it is certain, putting the facts together, that the payment was intended to meet the debt. Now, wherever there is such an intimation, express or implied, the creditor must, if he accept the payment, appropriate it according to the debtor's intention.

83. Sometimes, however, it happens that a debtor who

2nd rule. If debtor does not appropriate, creditor may.

S. 60.

owes his creditor several distinct debts makes a payment without either expressly or impliedly intimating to which of them the payment is to be appropriated. In

this case the creditor may apply the payment to any lawful debt payable at the time to him by the debtor. This is often a most important power, because a debt may be lawful and payable, and yet not enforceable, as, for instance, if it is barred by the Limitation Act; in this case it is a great advantage to the creditor to be able to devote the payment to the unenforceable debt, leaving those upon which he can sue to be disposed of hereafter.

84. There is a third class of cases in which neither debtor nor creditor makes any appropriation, and when it becomes necessary afterwards to decide to which of several debts a particular payment by the debtor is to be appropriated. Here, the rule is,

Rule 3rd.
Where neither
party appropri-
ates.

S. 61.

that the payment is to be devoted to the debts in order of time, whether the remedy for them is barred by the Act of Limitation or not; and that, if the debts are of equal standing, the payment will be appropriated to the discharge of each proportionately.

85. We have seen that contracts cannot be enforced in some cases because they are voidable or void; in other cases because of the conduct of the promisee, either in preventing performance, or in failing to perform a reciprocal promise. We now come to consider another manner in which the obligation imposed on the parties to a contract may be discharged, namely, by the parties agreeing to substitute a new contract in its place, or to rescind it altogether, or, without rescinding it altogether, to alter some of its terms. Whenever this is done, the right to claim performance of the original contract is done away with. The changes which it may suit parties to a contract to make in their relations to each

Substitution,
rescission, or al-
teration of con-
tracts.

Ss. 62, 63.

Different
modes in which
contract may be
changed.

other are of various kinds: there may be a change in the parties themselves, as where a creditor accepts one man as his debtor in lieu of another, and releases the

original debtor; or where a creditor takes a joint and several promissory note from several persons in respect of a debt originally owed to him by one. There may be a change in the character of the security by which the debt is secured, as, for instance, where a creditor gets a mortgage-deed for a previously existing debt, or a bond or promissory note in respect of money due on account stated. There may be a change in the thing to be done under the contract, as where creditors agree to accept a composition from their debtor, or to accept delivery of goods in lieu of a cash-payment, or to vary the performance in any other particular.

86. The subject is, under English law, complicated by several somewhat technical rules, and by the contrivances to which recourse has been had in order to evade them. One of these rules is, that an agreement to vary a contract must, like any other contract, be supported by consideration, and that, therefore, a simple agreement by a creditor to accept less than the debt due to him cannot be binding. The stringency of this rule is evaded by the provision that any change, however slight, in the nature of the thing given in satisfaction of the original debt is to be presumed to be for the creditor's benefit, and thus to constitute consideration. Thus, though an agreement to accept £50 in lieu of a debt of £100 would be invalid in England as being made without consideration, an agreement to accept a promissory note for £50 in lieu of a debt for £100 would be good, the change in the nature of the security being regarded as the consideration for the agreement. Under the present Act this rule is not preserved.

Rules of English law as to rescission.
 Promisee may remit performance wholly or in part.

S. 63.

Every promisee may, it is provided, partially or wholly dispense with or remit performance of the promise made to him, or may accept any satisfaction in place of it which he thinks fit. If A, accordingly, owes B Rs. 5,000, and B chooses to accept Rs 2,000 in discharge of the debt, the whole debt is discharged, though the payment of the smaller sum is made in the same form, at

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the same place, and under the same circumstances in every respect, as were provided in the case of the larger sum.

87. Another rule of English law which appears to be dispensed with in the present Act is, that, *Waiver.* though waiver, *before breach*, may be pleaded in exoneration and discharge of a contract, yet that, *after breach*, the right of action arising under the contract can be got rid of in two ways only, either by a release under seal, or by accord and satisfaction,—that is, an agreement to receive something instead of that which was promised in the contract, coupled with actual receipt of the thing so agreed. Under the present Act it does not appear that this distinction is maintained; and the language alike of the sections and illustrations indicates that, either before or after breach, the promisee may validly bind himself, either to dispense with the performance of the contract altogether, or to accept partial instead of entire performance, or to accept something different from that which was promised in satisfaction for it.

88. Another rule of English law in connection with the subject is that which requires that a document under seal should not be modified except by an instrument of equal authority, and, consequently, that when an agreement has been embodied in a deed, neither a subsequent oral agreement, nor a written agreement unless executed as a deed, should have any effect in modifying its provisions. This subject is now, so far as Indian Courts are concerned, regulated by Section 92 of the Indian Evidence Act, the fourth proviso to which indicates the cases in which a subsequent oral agreement is inefficacious to set-aside or modify a written contract.

89. Before quitting the subject of the obligations created by contracts, we have to deal with certain duties which, though not really arising out of contract, and though consequently, strictly speaking, out of place in a law of contract, have, for convenience sake, been provided for in

Evidence of
subsequent
agreement to re-
vise or modify.

Certain rela-
tions resembling
those created by
contract.

Ch. V.

the present enactment. These duties are sometimes spoken of as arising *quasi ex contractu*, and the English law deals with them generally on the theory of an assumed contract which, though the parties have not made it for themselves, the law, under the circumstances, makes for them. They may be generally described as cases in which, on account of something or other done by one person, it is equitable that money should be paid to him by another. No contract has been entered into, no wrong has been committed, but a state of things has come about which requires an adjustment between the parties. One man has paid another a sum which is not due to him, or more than was due to him, or he has incurred some expense for which the other was legally liable, or he has done something else which is for the advantage of the other, which advantage the other enjoys, and for which it is accordingly just that he make due compensation. No express provision for enforcing the right to payment of this compensation was to be found among the forms of action known to the English Common Law, and resort was accordingly had to the fiction of a contract, by which the party benefited was supposed to have promised to do that which it was equitable that he should do, and which the other party could thus compel him to do.

90. Under the present Act this notion of an implied contract is wholly got rid of, and the duty of paying is based in each instance on a direct legal enactment. The first of these cases is that in which a person incapable of entering into a contract is supplied with necessities suited to his condition in life. Here, clearly, no contract has been entered into between the party supplying the necessities and the party receiving them, inasmuch as the latter is incapable of entering into a contract. Yet it is obviously desirable that persons, though incapable of contracting, should be supplied with suitable necessities, and it would be inequitable that the person supplying

Cases in which
necessaries are
supplied to a per-
son incompetent
to contract.

S. 68.

them should not be reimbursed. It is accordingly provided that, where suitable necessities have been supplied to a person incapable of contracting, the person supplying them is entitled to be reimbursed from the property of the person to whom the supply has been made. No remedy against the person of the incapable person is provided; the remedy given by the section is confined to proceedings against his estate. The same result follows if suitable necessities are supplied to any one whom a person incapable of contracting is legally bound to support. Supposing, for instance, that the wife and children of a lunatic are supplied with necessities suitable to their condition, the price of these can be recovered from the lunatic's estate.

91. A similar obligation is created when a person whose interest it is that a payment which another person is legally compellable to make should be made, proceeds himself to make that payment. B, for instance, holds certain lands on a lease from A. A falls into arrear with the payment of revenue which he is legally compellable to make. B has an interest in A's paying it, because, if A does not, the lands become liable to sale and B's lease to annulment. Here, if B pays the arrear of revenue on A's behalf, he can recover it from A. On the same principle, if, where there is a law of distress, a person whose goods, left in another person's house, have been distrained pays the amount necessary to release his goods, he can recover the amount from the person on account of whose debt the goods were distrained.

92. A similar duty of reimbursement arises when one person lawfully does something for another, or delivers something to him, not intending to do so gratuitously. In this case the person enjoying the benefit of the act so done, or things so delivered, is bound to reimburse the other party. A, for instance,

Cases in which payment which one person is legally bound to make, is made by another.

S. 69.

Duty of the person enjoying the benefit of a non-gratuitous act.

S. 70.

saves B's property from fire under circumstances which show that he is not intending to do so gratuitously. B is bound to compensate A for the labor so expended. If, however, there are circumstances to show that the person intended to act gratuitously, nothing can be recovered. What the intention was in each instance is a matter of fact which the Court must decide from the language of the parties and the circumstances of the case.

93. Another relation which arises between persons without any contract is where one man finds goods of another and takes them into his custody. Here, though there is no contract between the parties, the duties of the finder are the same as those of a bailee: and he will be entitled to compensation and may retain the goods until such compensation be paid.

Relation of the
finder of goods
to the owner.
Ss. 71, 168.

94. Often, again, it occurs that money is paid or goods are delivered by mistake or under coercion. It is, under the Act, the duty of the person to whom money is so paid or goods are so delivered to repay the money or restore the goods. The duty of restoring any advantage received under a voidable contract if it is avoided, or under a void agreement or a contract which has become void, has been already noticed (a). It is, like those now under notice, a duty arising, not out of contract, but from the mere relation of the parties.

Money paid or
goods delivered
by mistake.
S. 72.

95. Having now examined the ingredients of a contract, the essentials to its validity, the proper mode of performance, and the modes in which the right to it may be superseded, we have only to consider the effects of breach of contract, that is, of the state of things in which a party to the contract, in the absence of any excusing circum-

Breach of con-
tract.
S. 73.

(a) Paragraphs 79 and 80.

stances, fails to perform that which he is bound under the contract to do. We have already seen

Effects of breach in releasing other from obligation of performance. that one result of failure to perform a promise is to absolve the promisor of a reciprocal promise from the obligation to

perform, and to entitle him, notwithstanding the non-performance of his own promise, to sue for compensation for loss arising to him from the non-performance of the contract. We now have to deal with the mode in which this

Rules as to damages. compensation is to be ascertained, and, as to this, several rules are laid down in the

S. 73.

Act. In the first place, the party injured

by a breach is entitled to receive from the party committing the breach compensation for any loss which arose naturally in the usual course of things, or which, though not arising naturally in the usual course of things, was known to the parties to be likely to arise from the breach.

This compensation, however, cannot be recovered in respect of remote and indirect loss sustained by a party to a contract by reason of its breach. The consequences of every act are in one sense infinite, and the line of causation might be traced indefinitely through a long series of events. The law, however, cannot enter upon these profound and lengthy enquiries; it can recognize only the direct, natural, and obvious connection of events, and it will not hold the person committing a breach responsible for any loss, except such as arose directly in the natural course of things from his breach of contract, or which he knew to be likely to arise directly from it.

96. Another rule in estimating the loss or damage

Account to be had of means of remedying the inconvenience occasioned by breach. arising from a breach of contract is, that the means which existed of remedying the inconvenience occasioned by the breach must be taken into account. Suppose, for

S. 73.

instance, that A hires a ship to go to Bom-

bay, take on board a cargo and bring it to Calcutta, and that B commits a breach of this contract by failing to send

the ship. The measure of damages in this case will be the difference between the price at which A was entitled under the contract to have the goods brought from Bombay to Calcutta, and the sum which in consequence of the breach of contract he was actually obliged to pay for the hire of another ship. Any loss which arises naturally and directly from the delay of the goods, if delay be occasioned, will have to be included. A, in calculating the damage, will moreover be entitled to include any expense and trouble to which he was put in finding a substitute for B's ship. It may be that a substitute could not be found without great trouble, expensive agents, advertisements, telegrams, &c. It may be, on the other hand, that the harbor was full of idle ships, and that A's want of one was no sooner known than satisfied. Each set of facts would have to be considered in estimating the damages to which he is entitled in respect of B's default.

97. Numerous illustrations are given in the Act for the purpose of showing the mode in which, in various cases of breach, the damage is to be computed. These will be considered hereafter. For the present it is enough to have stated the general principle on which the calculation will proceed; and we pass on to a class of cases of frequent occurrence, in which the parties have, so to speak, estimated beforehand the damage to arise from a breach, by naming in the contract a sum which is to be payable in case of a breach by way of penalty. In cases of this description, the question which presents itself to an English Court is, whether the sum named is in the nature of a penalty, or a sum agreed by the parties to be taken as the measure of damages; for the law does not permit the party complaining of a breach to recover the whole sum, if its character is penal and its amount bears no relation to the injury actually sustained by him.

Cases in which
sum is named as
payable in case
of breach.

S. 74.

English rules
as to penalties.

98. The English decisions on the subject are not altogether free from difficulty; but it is unnecessary to consider them, inasmuch as the present Act provides for the subject in a manner which, if it gives the Court a somewhat dangerous latitude of action, lays down, at any rate, an intelligible rule. It appears to aim at a middle course between two opposite extremes. On the one hand it would be dangerous to allow the sum named in case of breach to be in every instance recoverable without regard to the position of the parties and the facts of the case. The rashness of mankind and the reckless manner in which uneducated persons expose themselves to a liability which they consider to be out of the range of likelihood, would render such instruments so frequently productive of the gravest hardship, that it would be impossible to give up altogether the power of modifying their effects where the occasion seemed to call for it. On the other hand, if parties stipulate that, in case of a breach, a certain sum shall be recoverable, they must be held to mean something by the provision, and, consequently, it is desirable that their intentions should, so far as possible, be carried out. The problem seems to be to give the stipulation some effect, and at the same time to enable the Court to guard against that effect being in any case so monstrously disproportionate to the interests concerned and the real damage inflicted, as to work an obvious injustice. This is done in the Act by the provision that, in cases where a sum is named to be paid in case of breach, the party complaining of the breach is entitled, whether actual damage has been sustained or not, to receive 'reasonable compensation' from the party committing the breach, such reasonable compensation in no case to exceed the sum named in the contract. The effect of this provision is, that the Court will not be bound to look with minuteness into the nature and extent of the damage, nor indeed to ascertain that there has been any actual damage, though this, if brought to its

attention, would form an important element in the calculation; but will be guided by the position of the parties, the nature of the interests involved, the probable anxiety of the parties to prevent a breach, the difficulty of representing in figures or words the precise amount of injury inflicted by the breach, and, generally, the circumstances of the case. The latitude of discretion thus given to the Courts is considerable; but this is deemed a lesser evil than either giving such instruments an invariable rigid construction, or leaving their legal effect beset with technicalities and involved in obscurity. Under the present Act, a man who agrees to pay Rs. 10,000 in case of breaking his contract, will know that he runs the risk of having to pay anything short of this sum which the Court considers 'reasonable' under the circumstances of the case, irrespectively of the damage which the other party to the contract may actually have sustained.

99. An exception is made to this rule in the case of bail-bonds, recognizances, and other instruments of a like nature, in which persons bind themselves to Government for the due performance of various public duties. In such cases the full amount specified in the instrument is recoverable. This exception does not, however, apply to ordinary contractors with Government; a contract, therefore, by a builder or cattle-dealer, to do work for or supply cattle to Government, in which he binds himself to pay a fixed sum in case of breach, will be subject to precisely the same rule of construction as governs cases of this description between private individuals.

100. Having now disposed of the general rules affecting all contracts, we pass on to a more detailed consideration of certain contracts, and, first, of the Contract of Sale.

101. The Act deals with the subject, first, by laying down the conditions of a complete sale and its consequences, then the rights and obligations.

G

gations which arise out of the contract. By a complete sale is meant a transfer of the ownership of a thing from the seller to the buyer in exchange for a price; and by

ownership is meant the right by virtue of which a man exercises complete and exclusive dominion over a thing. There are various rights which a person may exercise over a thing, but ownership is not correctly said to be the sum of those rights, because it may exist although many of those rights reside in some person other than the owner. One man may be the owner of a thing: another have the right of user: another may have some other qualified right. Ownership does not necessarily connote the right to immediate unconditional possession. A person is said to be owner of a thing, though he is not in actual enjoyment of any of the rights of ownership, if, upon the performance of some condition, he is entitled to be invested with those rights, and can transfer that title to another.

102. Simultaneously with the acquisition of ownership, even in this qualified sense, the owner takes upon himself the risk of any loss arising from the destruction of or injury to the thing: and, therefore, in case of loss or destruction, as also in case of the insolvency of one of the parties, it is of extreme importance to define the exact moment at which the ownership is transferred. Accordingly, the Act gives various rules for determining this question under different circumstances; and, first, it deals with the case of a sale of an ascertained thing at a fixed price.

103. This is the simplest case of a transfer of ownership; where offer and acceptance, the primary elements of this, as of every, contract, have taken place, the ownership in the thing passes, or, in other words, the sale is complete, immediately upon any one of the following conditions having been complied with: these conditions are—

Ownership involves risk of loss or injury.

S. 86.

Sale of specific thing.

S. 78

- (i) Earnest, or tender, payment or part-payment of the price ; or
- (ii) Delivery or part-delivery of the thing ; or
- (iii) An agreement, express or implied, for the postponement of delivery, or of payment, or of both.

The occurrence of any one of these circumstances, coupled with offer and acceptance of the price for the thing, or the thing for the price, renders the sale complete, and the ownership has passed.

104. Having thus disposed of the simplest case, we come

**Sale of things
whose identity or
price is not deter-
mined, or of things
in incomplete
state.**

next to other sales, in which various circumstances affecting either the thing or the price render it necessary that certain further conditions should be performed in

order to effectuate the transfer of the ownership. It may be that the seller has offered for sale some one thing out of many others of the same nature, the identity of which is not determined ; or he may have offered a thing yet unmade or unfinished, or a thing to which he is by the contract bound to do something before the buyer is bound to take it. In each of these cases some circumstance affecting the object of the sale prevents the property in it passing to the buyer. The Act adopts the rule of the civil and the English law, that ownership cannot pass except in a definite existing thing. It does not, however, follow that a contract with reference to non-existing things is altogether invalid ; for it may give rights of action to seller and buyer respectively, *e. g.*, for non-acceptance and non-delivery, and yet not be a complete contract of sale so as to effect the transfer of ownership. The fact that the thing to be sold is unfinished is not, moreover, an absolute bar to the sale ; for a man may, if he chooses, and expresses his intention to that effect, buy a thing which is only half made : but from the offer and acceptance of unfinished goods, with no more said on either side, the inference is, that the two parties intended the finishing of the goods to be a condition precedent to the transfer of the

ownership. This inference is stronger where the seller is himself the manufacturer; but even in that case it would seem that the inference is one which may be rebutted.

105. In general, however, in order to convert this incomplete contract into a complete one, there must be some further act on the seller's part, either authorized or assented to by the buyer, indicative of an intention to appropriate certain specific goods to the contract. For instance, if the thing sold is a certain quantity of sugar out of a larger quantity in bulk, the sale is complete as soon as the agreed quantity is set apart by both parties; or, if the seller is to send the sugar to the buyer, then the former is held to be authorized to select the quantity himself, and when he has done so, the quantity selected becomes appropriated to the contract. In either case the property in the sugar passes as soon as it has been so appropriated. Similarly, if the object of sale is not yet in existence when the contract is first entered into, but is subsequently produced, a similar appropriation of it may be made with similar results.

Such are the various circumstances affecting the thing to be sold, which the Act declares are to prevent the sale being complete until the performance of certain further conditions has taken place: the object of these conditions is, shortly, to determine the identity of the thing and to put it into a state conformable with the presumed intention of the parties. The buyer is not to have to bear the risk of loss, until the thing which he bargained for is at least in a state fit for delivery.

106. As to the price of the thing sold, if the ascertainment of it necessitates the doing of something to the thing by the seller, *e. g.*, weighing or measuring, then such act must also be done before the sale is complete. If, however, there is no agreement at all as to the price, it does not seem that its uncertainty affects the contract. The

Sale of thing of which price is not determined.
S. 89.

property may pass notwithstanding, and the Court will, upon the suit of the seller, award such price as it deems reasonable.

107. We now come to a series of provisions which deal with delivery of the thing sold. Delivery, Delivery. S. 90. it will be remembered, is one of the alternative conditions necessary for making the sale complete. Delivery of a thing is effected by any act which has the effect of transferring the possession from one person to another. As possession, like most other legal acts, may be exercised through another person, it is not necessary that the buyer should himself obtain physical possession of the thing; it is sufficient if it is put into such a position as to be under his control. Thus, goods may be delivered to a buyer by the mere handing to him of the key of the godown in which they are kept; or by giving him an order addressed to the holder of the goods, in compliance with which the latter assents to hold them on account of the buyer; or by any other act which shows that the two parties have agreed, the one to abandon, and the other to accept, the control of the goods.

108. There is, however, a proviso which limits the effect of delivery to a third person on account of the buyer, when such person is a wharfinger or carrier; for, though in other respects such a delivery is complete, yet, if Conditions of delivery to wharfinger or carrier. S. 91. it be not of such a nature as to enable the buyer to hold the wharfinger or carrier responsible for the safe custody and delivery of the goods, it will not make the buyer liable for the price of goods which do not reach him. If, therefore, the seller has omitted to do something necessary to complete the wharfinger's or carrier's responsibility, or has done something which has the effect of impairing his responsibility, the seller will, in case of loss, have to bear it himself.

109. It will be remembered that delivery and part-delivery were alike declared to be among the conditions of a complete sale; but this effect of part-delivery is limited to those Effect of part-delivery. S. 92.

cases where no intention is exhibited of severing part of the goods from the whole. In the ordinary instance of a partial delivery made in the course of the delivery of the whole quantity, there is evidently no such intention, and there must be something exceptional in the circumstances to afford evidence of it.

110. With regard to the time and place for performance of the promise to deliver under a contract for the sale of goods, there are two general rules as to delivery of goods sold. Ss. 93, 94. rules which govern the subject. The first is, that, in the absence of express agreement, the promise to deliver is one which need not be performed without the application of the promisee, which application must be made in conformity with the provisions specified in paragraph 68. The second rule is, that the place in which the promise of delivery is to be performed is, in the absence of any special promise, either the place where the goods are at the time of the sale or of the contract for sale, as the case may be, or, if the goods are not then in existence, the place where they are produced. The mode in which special agreements as to the delivery are to be carried out will be governed by the rules stated in paragraphs 65—68. A wrongful refusal to accept the goods sold amounts to a breach of the contract of sale, but a refusal is not wrongful unless the delivery be made in accordance with the terms of the contract, and even if the goods which a person has ordered are otherwise properly delivered, he may refuse to accept them if other goods are sent with them and any risk or trouble might be incurred in separating them.

111. We come next to the consideration of certain rights of the seller, the general object of which is to afford him, after parting with the ownership, security for the due performance of the buyer's promise, and which, accordingly, are available to the seller upon the appearance of a probability that the buyer will fail to perform his promise. The first right is the right of lien on the goods, which exists as long as the goods are in the

Rights of seller.

Lien.

Ss. 95—98.

seller's possession, and the price or any part of it remains unpaid. It is a right which arises out of the seller's possession, and is lost with the loss of possession; anything, therefore, which amounts to delivery of the goods, destroys this right to detain them for the unpaid price. Notwithstanding the retention of possession, the seller may be,

Contract may be inconsistent with lien. nevertheless, disentitled to assert his right of lien, if the contract contains anything inconsistent with such right. The ordinary

sale of goods on credit is an instance of a sale under circumstances which show an intention on the seller's part to abandon his lien; for the promise of the seller is to deliver upon demand; the promise of the buyer is to pay the price upon a given future day: the latter is, therefore, entitled to claim delivery before he can be called upon to pay. The seller's right of lien is, however, in such cases only suspended, and there are two events upon the occurrence of either of which it may be revived.

Revival of lien.

In the first place, if, during the period of credit, but before delivery has taken place, the buyer becomes insolvent, the seller may retain the goods until he receives the price. And, secondly, if, when the period of credit has expired, neither party has performed his promise, and the seller still retains the goods and the buyer the price, the lien of the former on the goods is revived, and the parties bear the same relations to each other as they would have borne if there had been no agreement for credit.

The seller is also held to have abandoned his lien if he has in any way recognized the title of

Abandonment of lien.

a subsequent buyer; for though a mere sub-sale by the original buyer does not deprive the original seller of his lien, yet, if the original seller admits the title of the sub-purchaser, he is considered to have admitted the right of his purchaser to sell; and it would be inequitable to allow him, after making such an admission, to exercise a power over the goods inconsistent with the ownership of the purchaser.

112. The next right of the seller which we have to consider is that which arises upon the stoppage in transit.

Ss. 99—106.

have left the seller's possession, and is called the right of stoppage in transit. It is, in fact, a right on the part of the seller to recover his lost lien, and can be exercised at any moment before the buyer has acquired possession. The seller's position with regard to the goods when he has exercised the right is just the same as that of a seller who still retains his lien. In either case he is entitled to keep the goods as security for payment. The questions arising upon this subject are, when and how can the right be exercised, and how

When goods can be stopped in transit.

can it be defeated? At any time while the goods are in the custody of an intermediate person, who is not an agent to keep for either party, but an agent to forward from one to the other, the seller may, on the insolvency of the buyer, retake the goods; for, during this time, they are deemed to be in transit. The transit continues till the buyer, his agent or sub-purchaser acquires possession; and while it so continues, there is only one circumstance which can operate unconditionally to defeat the seller's right of stoppage. A mere sub-sale by the buyer

Right of stoppage how defeated.

has no more effect upon it than upon the right of lien; but if a sub-purchaser, in good faith and for valuable consideration, obtains an assignment of a document showing title to the goods, his right to possession thereby gained is indefeasible. The reason of this seems to be that the assignment of documents, such as bills of lading, is considered equivalent to delivery of possession, such symbolical delivery being the only possible

Assignment of document of title.

delivery under the circumstances. On the same principle, an assignment of a document of title by way of pledge, made in good faith to secure a specific advance, limits the power of the seller to exercise his right of stoppage; for, as against

the assignee, he cannot exercise it, except upon tender or payment of the sum secured by the assignment.

The last question connected with the right of stoppage in transit is as to the mode in which the goods can be re-taken. The seller may either actually take them from the carrier or other intermediate person, or he may effect stoppage by merely giving notice of his claim to the person in whose hands the goods are; provided that, if the goods happen to be in the hands of a servant of the carrier, the notice be given under such circumstances and at such a time as to enable the carrier to communicate with his servant in time to prevent delivery.

113. It has been said that these two rights,—*viz.*, that of lien and that of stoppage in transit,—belong to the seller as a security for the performance of the buyer's promise to

Mode in which
goods can be re-
taken in transit.
See 104, 105.

pay. The performance of this promise, as well as of the buyer's promise to accept the goods, is further secured by the right which is conferred upon the seller to re-sell the goods under certain circumstances. This right can, of course, be exercised only when the seller still has possession of the goods, either by virtue of his original lien or by having re-taken them in transit. Moreover, the seller must not re-sell without giving the buyer notice of his intention, and allowing him a reasonable interval of time in which to perform his promise. When, however, the goods are rightly re-sold, they are sold as the property of the seller, and the buyer who has made default is, therefore, not entitled to any profit arising out of the transaction; but if, on the contrary, the price which they fetch is less than the price for which they were originally contracted to be sold, the seller is entitled to recover the difference from the buyer, that being the measure of the damages occasioned by the breach of contract on the part of the latter.

114. The rights which the buyer acquires under the contract have now to be considered. The general rule is, that a purchaser obtains no better title to the goods than his seller had to convey. If, therefore, the latter had something less than the full rights of ownership, a purchaser from him takes a similarly modified ownership. For instance, as we have already seen when dealing with the right of lien, if a purchaser buys from a vendor goods on which a former vendor has a lien, the title acquired by the purchaser is subject to that lien,—that is to say, it is less than the title of a full owner by the circumstance that the right to immediate possession is outstanding.

This general rule is subject to three exceptions. The first of these has grown out of the necessities of commercial dealings, which oblige merchants to treat the holder of goods or of bills of lading and other such documents of title to goods as the owner of the goods in question, and to give him credit accordingly. This necessity has been recognized by the English legislature, and it is likewise recognized in the Act. Accordingly, it is provided that any one who, with the consent of the owner, has in his possession goods, or documents showing a title to goods, may convey a good title to a *bond fide* purchaser. The person in possession may have had instructions from the owner not to sell the goods, but, unless the purchaser has some reasonable grounds to presume that such is the case, he is entitled to infer from the mere fact of possession with the owner's consent that the person so possessing is authorized to sell.

The second exception to the general rule is also designed to protect the *bond fide* purchaser who sees his seller in possession and has no reason to suppose that he is not entitled to sell. This exception refers to the case where one of several joint-owners has, by the permission of the co-owners, possession of the goods, and sells to a *bond fide* purchaser.

Rights of buyer. General rule. S. 108.

First exception to general rule. S. 108.

Second exception to general rule.

In this exception, as in the first, it is to be observed that, if there was possession alone unaccompanied by consent of the other owners, the purchaser's title would not be any better than that of the person from whom he purchased.

The third exception operates in favor of the *bond fide* sub-purchaser of goods from one who is in possession of goods under a contract voidable at the option of the vendor. If, for example, the original vendor has been induced to sell by some misrepresentation on the part of the buyer, he is, as we have already seen, entitled to avoid the contract on discovering the misrepresentation; but this right exists only so long as the interests of no third person have intervened. If, therefore, before it be exercised, the purchaser has sold to a sub-purchaser, the latter, if *bond fide*, takes an indefeasible title. There is, however, one proviso limiting this exception, which is that the misrepresentation or other act on the buyer's part, which has occasioned the voidability of the contract, must not have been such as to amount to an offence on his part. The protection, therefore, afforded to the sub-purchaser by this exception does not operate when his seller has obtained the goods by cheating, forgery or other criminal device.

The general rule being that the purchaser takes no better title than his seller had, and it being therefore possible that he may be disturbed in his possession by the rightful owner, it follows, almost of necessity, that the contract should contain a promise on the seller's part to indemnify the buyer in the event of any such disturbance; for, otherwise, the latter might have paid the price and have only a law-suit in exchange. The Act, accordingly, declares that the seller shall be responsible to the buyer, if the latter is, by reason of the invalidity of the seller's title, deprived of the thing sold, for any loss caused by such deprivation, unless a contrary intention appears from the contract. This obligation of the seller is termed a war-

Warranty of title.
S. 109.

ranty of title, and arises out of the ordinary relation of tradesman and customer; but in various instances the exceptional circumstances of the case show that no such obligation was contemplated; for instance, it is clearly not intended to arise on a purchase at an execution-sale.

115. The other promises on the seller's part, which are also called warranties, relate to the quality of the thing sold. In the simple, outright sale of a specific thing, no such promise is implied; nor, in the absence of fraud and of any express warranty, is the seller responsible for a latent defect, if the article answers the description under which it was sold. To this rule the sale of provisions is the only exception: as to them a warranty of soundness is implied. In other cases a warranty can be established only by express contract or by the custom of the place or trade.

Next we have three special classes of cases in which a warranty is implied. The first is where the sale is by sample, and here the warranty is that the bulk is equal in quality to the sample. The second is where goods are offered as being of a certain denomination, and here the warranty is that the goods are such as are commercially known by that denomination; and the fact that the buyer has bought by sample, or inspected the bulk, does not affect this warranty. The third is where goods have been ordered for a specified purpose, for which goods of the denomination mentioned are usually sold, and in this case the warranty is that the goods are fit for that purpose. When, however, an article of a well-known ascertained kind is sold, there is no implied warranty that it is fit for any particular purpose. The distinction between this case and that in which goods are ordered for a specified purpose, appears to be, that in the one the buyer trusts to the seller to select him an article fit for the given purpose, and that in the other he trusts to his own judgment.

116. The consequences of a breach of warranty, whether expressed or implied, have next to be considered. If the article sold is a specific thing, and it has been delivered and accepted, the sale is complete: the buyer cannot avoid the contract on the ground of breach of warranty; his only remedy is in damages for the loss caused by the breach; nor, under the same circumstances, can the vendor rescind the contract because the buyer has failed to pay the price, unless the contract have been made expressly conditional upon the goods complying with the warranty or upon the fact of the price being paid.

Where, however, the sale is of goods which at the time of the contract were not ascertained, or not in existence, or, in other words, where the sale is incomplete and the ownership has not passed, the buyer has, upon discovery of a breach of warranty, the choice of three courses of action. He may accept the goods with their defects; he may refuse to accept them; and, thirdly, he may receive them, keep them for a time reasonably sufficient for examining them, and then refuse to accept them: but this latter right will be forfeited if he exercises over the goods any act of ownership other than is necessary for the purpose of examination. Whichever course he adopt, he is entitled to compensation for the loss caused by the breach; though, if he intends to exercise this right after accepting the goods, he must give notice of his intention within a reasonable time after discovering the breach of warranty.

117. The next contract to be considered is that of Indemnity. This contract really belongs to the general class of contingent contracts discussed in paragraph 48; for it is a contract to do something if some event collateral to such contract does or does not happen. The commonest in-

Results of
breach of war-
ranty.
Sa. 117, 118.

Right of pur-
chaser on breach
of warranty
where sale is
incomplete.

Ch. VIII.
Indemnity.
Sa. 124, 125.

stance is afforded by the contract of insurance, in which the underwriter, the promisor, takes upon himself the risk of loss or damage to a certain thing under certain conditions. The indemnity, however, treated of in the Act is confined to those cases where the loss is to be caused by the conduct of the promisor himself, or by the conduct of some other person ; and the only question, therefore, which can arise, is whether the loss for which the promisee seeks reimbursement is really the loss for which the promisor meant to indemnify him.

The general proposition affirmed by the Act as to the rights of a promisee under a contract of indemnity is, that the promisee is entitled to recover all damage and consequent expense which a prudent man, unindemnified, would have incurred under the circumstances. If he has received any special order or authority from the promisor with regard to his conduct of the matter, his contravention of such order, on the one hand, will disentitle him to relief ; and his acting under such authority will, on the other hand, excuse acts which, in the absence of such authority, a prudent man would not have committed. But, apart from such special orders or authority, the promisee has only to conduct himself as he would in prudence have done without such contract of indemnity, in endeavouring to avert or lessen the loss, in order to entitle himself to recover the amount of the loss together with all the expenses which he has incurred in so attempting to avert it.

118. The contract of guarantee differs from that of indemnity, because it implies the existence of three parties, and because it is entered into for the security of a creditor, and not for the reimbursement of a loss. A surety contracts with a creditor that, upon the default of the latter's debtor, he will perform the promise, and his liability is, therefore, ordinarily co-extensive with that of the debtor. The result is that

Rule for determining liability under contract of indemnity.

Guarantee.
Ss. 126—128.

the creditor has the security of two promisors instead of one, and thereby protects himself by anticipation from the possibility of loss, instead of providing a reimbursement of an actual loss, as is the case contemplated in a contract of indemnity.

119. The consideration for the promise of the surety may be either something done at his request for a third party, who thereby becomes principal debtor, or, if the principal debt is already in existence, it is frequently a promise on the part of the creditor to forbear from pressing for its payment. The fact of the person to whom the guarantee is offered acting or forbearing as requested, is tantamount to acceptance of the offer on his part, and the offer then becomes a contract, which he can enforce against the surety. For instance, if a father requests a dealer to supply his son with goods on credit, and promises to guarantee the payment, the fact of the dealer supplying the goods is evidence of acceptance of the proposal and converts it into a contract; or, again, if a merchant is induced by the offer of a guarantee to take into his employment some person as cashier, the obligation of the surety to answer for the conduct of the cashier becomes complete upon the cashier being taken into employment.

120. This contract may be made with regard to one transaction, or with reference to a series, in which latter case it is called a continuing guarantee. Such a contract is regarded in law as a succession of offers to guarantee, each of which becomes a complete contract upon the creditor's acceptance of it. It follows, therefore, that the surety may revoke such an offer at any time before acceptance, and that it is necessarily revoked by his death. At the same time his liability in respect of matters as to which his proposal was accepted remains, of course, untouched, just as it does in the case where there is only one transaction contemplated by the parties.

Continuing
guarantee.
See 129—131.

121. The contract, however, does not only imply a promise on the part of the surety; it also implies rights in his favor as against the creditor and the principal debtor, and correlative duties on their part towards him. In the first place, it is the duty of the creditor to disclose to the intending surety all circumstances which may be material to him in forming a judgment upon the risk he is to undertake. The circumstances of a debtor are peculiarly within the knowledge of his creditor, and the creditor is, therefore, bound to inform the surety of anything which might not naturally be expected to exist, and of which he is aware. If he fails to do so, the contract of guarantee is rendered voidable on the part of the surety, and any misrepresentation which the creditor makes or allows to be made will have the same effect.

In the next place, the surety enters into the contract upon the understanding that a certain condition of things exists and will continue to exist. If, therefore, any alteration is made in the contract between the creditor and the principal debtor, the surety is discharged, because the liability which is sought to be enforced under the changed state of circumstances is not that which he originally undertook. Thus, a change in the nature of the office or employment held by the person whose integrity is guaranteed, relieves the surety from his engagement. A change in the parties themselves, as, for instance, in the constitution of a firm, has the same effect as a change in the terms of the contract. In neither case can the surety's liability on the guarantee be extended to any transaction which took place subsequently to the change.

122. The other rights which the surety has as against the creditor, are necessary to protect the rights which the surety possesses as against the principal debtor. These latter rights are nothing less than to be placed in the position of the creditor, and to be invested with all the rights and securities which the latter possesses against the

Rights of surety.
Ss. 132, 133.

Rights of surety with regard to debtor.
Ss. 134—141.

debtor. If, therefore, the creditor does or omits to do anything, the legal consequence of which is the

Release of debtor. discharge of the debtor, the surety is released. The discharge of the principal obligation by the discharge of the accessory follows, not merely from a technical rule of law, but from the equity of the case. In the first place, the creditor, by so discharging his debtor, puts it out of his power to fulfil the engagement into which he has entered to enforce payment when the surety has a right to require him so to do; and, secondly, the discharge of the principal debtor would be merely illusory, if it did not cause the discharge of the surety, because the latter, on being compelled to pay, would immediately claim to be indemnified by the principal debtor. The Act, while it preserves intact the rule of English law, that a release of the principal debtor operates to discharge the surety, further declares that any agreement between them, falling short of a release,—*e. g.*, a promise to give time, or not to sue,—may be entered into without discharging the surety, provided he has given his assent to the agreement. In no case is the surety discharged in consequence of the creditor's neglect or indulgence in recovering the debt.

123. The rights of the surety against the debtor remain to be considered. As the liability of the

Rights of surety against debtor.
S. 145.

surety is co-extensive with that of the debtor, so are the rights of the surety co-extensive with those of the creditor. The

surety who has discharged the debt is entitled to have all such securities for the debt as existed at the time of his entering into the contract, and still continue to exist, assigned to him for his benefit; and it is immaterial whether he knew of their existence or not. If any such securities have been lost or not properly perfected through the creditor's neglect, the surety is discharged to the extent of the amount so lost. Further, he is entitled to be indemnified by the debtor for all sums which he has rightfully paid under the guarantee;

Right of indemnity.

and he retains this right even where there has been an agreement between the creditor and debtor suspending the creditor's right against the debtor, but reserving his remedies against the surety. The right of the surety to indemnity still remains under such circumstances, unless a contract to abandon it is proved.

124. Where there are several co-sureties, the further right of contribution exists between them in case of any one or more of them having to discharge the principal debt. Although each surety is bound in a separate instrument and contracted in ignorance of the fact that there were other sureties, yet, if the guarantee given by them is in respect of the same principal debtor and the same engagement, the right of contribution exists. In ordinary cases their contribution will be equal; but if they are bound in different sums, the amount contributed by each cannot exceed the sum fixed by his obligation. As agreements between creditor and principal debtor do not affect the surety's right to be indemnified by the latter, so the release by a creditor of one surety does not affect the rights of his co-sureties against him.

Ch. IX. Bailment. 125. The next class of contracts to be considered is that of Bailments.

A bailment is said to be constituted by the delivery of a thing by one person to another for some purpose, upon a contract that it shall be returned or otherwise disposed of according to the directions of the person delivering it, when that purpose is accomplished. The relation of bailor and bailee being so established may exist for a fixed or an indefinite time. The bailor may or may not be the original owner: the bailee may be more or less restricted in his use of the thing: but the fact of possession being derived from one who reserves to himself the power of determining it under certain contingencies suffices to make the possession so derived that of a bailee.

Right against
co-surety.
Ss. 146, 147.

Definition of
bailment.
Ss. 148, 149.

126. The character of the different kinds of bailment is determined by the purpose for which the thing was bailed, and by the powers which are vested in the bailee for the accomplishment of that purpose. Thus, in one case, where the purpose of the bailment is the mere custody of goods, possession, determinable at any moment, is all that the bailee requires; in another, where the security of a debt due to the bailee is the purpose of the bailment, the power of alienation is, under certain restrictions, accorded to the bailee. All the different kinds may be conveniently divided into three classes: (1) those in which the trust upon which the thing is held is for the benefit of the bailor; (2) those in which it is for the benefit of the bailee; (3) those in which it is for the benefit of both parties. The first class embraces those cases where the thing is delivered for the purpose of safe custody or of having labour expended upon it. The second includes gratuitous loans, and the third, pledges and contracts of hiring. The definition of bailment given is wide enough to comprehend all these classes; but the Act deals specifically with four only of the various sorts of bailment which fall within the definition. These four are: the bailment of hiring, of loan, for work to be done, and of pledge. The rights of the finder of goods are also provided for, as, although he does not fall within the definition of a "bailee," his position is in many respects similar. The bailment for carriage is intentionally omitted; that subject being already provided for by a distinct enactment. Nor is any special mention made of the bailment which arises out of the relation of a vendor and vendee, when the former is either exercising his original right of lien, or has revived it by stoppage in transit. This and other forms of bailment for which no express provision is made will be regulated by the general law as laid down in the Act.

127. The method adopted in the Act seems to be to prescribe the obligations which arise out of the relation of the parties in order of time. The first obligation on the part of the bailor is

Duties of bailor.
S. 150.

to disclose to the bailee any defects in the goods bailed of which he is aware, and which either interfere with the use of it or expose the bailee to extraordinary risks. In default of the bailor's making this disclosure, he becomes liable for damage arising from such faults. This provision not only meets the case of dangerous goods, such as nitro-glycerine or gunpowder, being deposited with a warehouseman or carrier without any notice of their character; but also protects the borrower who is entrapped by the silence of the lender into accepting the loan of a thing which has such latent defects as to make the use of it dangerous. There must, however, be damage directly arising from the concealed fault; for it is not intended to make the lender liable to an action merely because the thing was less useful than it was expected to be. The hirer of goods is in a different and more favorable position; he is entitled, in case of damage arising from undisclosed faults in the thing bailed, to hold the bailor liable, even though the latter was not aware of the defect which has caused the damage.

128. The duties of the bailee with regard to the thing bailed during his possession next require consideration. First, there is the general duty applicable to all kinds of bailments,

Duties of bailee.
Ss. 151—157.

namely, to take as much care of the thing as a man of ordinary prudence would, under similar circumstances, take of his own goods of a like nature, bulk and value; secondly, there is the obligation to comply with the conditions of the bailment, and to make compensation for loss happening during any use of it contrary to those conditions; thirdly, as it is the ultimate duty of the bailee to return the identical thing bailed, it follows that he must keep it distinguished from other things of the same nature. There may, of course, be a mixture by the consent of both parties, and then each has an interest in the mixture in proportion to his share. But if the mixture is made without the bailor's consent, the bailee has committed a breach of duty, and he is bound to compensate the bailor. The amount of the compensation will depend on the nature of the goods:

if they are such as can be separated, the measure of compensation is the expense of the separation and any damage arising from the mixture: if, on the other hand, it is impossible to separate them, then the bailor is entitled to be compensated as for the total loss of his goods.

129. There are certain circumstances under which a bailment may be determined, notwithstanding that the purpose of it has not been accomplished, or the time fixed for it has not expired. A breach on the bailee's part of the duty of complying with the conditions of the bailment gives the bailor power to claim back the thing bailed. A man who hires a horse for riding must not drive it; if he does, not only does he become liable for any damage to the horse, however it may happen, while he is driving it, but he also runs the risk of having the contract between him and the owner cancelled by the latter reclaiming the horse immediately upon the discovery of the unwarranted use: and of course, if the bailment be one of loan, the borrower does not stand in a more favorable position; for gratuitous bailments may be determined at any moment at the will of the bailor, even though the loan were made for some specified purpose which is unaccomplished, or specified period which is unexpired. The only right which the borrower has under such circumstances, is to be indemnified for any loss which he may have incurred from his having relied on the circumstance that the loan was made upon such specified terms. If the lender by his conduct, first, in making such a loan, and, subsequently, without reason retracting it, has put the borrower to any loss, he must make compensation; and the measure of it will be the difference between the loss so sustained and the benefit which, notwithstanding the revocation, the borrower has derived from the loan. The death of either party is another circumstance which determines gratuitous bailments, because personal considerations are supposed to form part of the motive for such bailments.

Determination
of bailment.
§s. 159—162.

130. If the bailment is not previously determined in any of these modes, and if it be made for a given time or purpose, it comes to an end of itself upon the accomplishment of such purpose, or the expiration of such time; and the duty thereupon devolves upon the bailee of returning the thing without demand. The penalty of his default is that he becomes absolutely responsible for the loss or deterioration of the thing, however it may be occasioned. He must, therefore, return it or deliver it according to the bailor's direction; and when he has done so, he is, if he has acted in good faith, no longer responsible, although, subsequently, the thing is claimed by a person who asserts himself to be sole rightful owner, or a joint-owner with the person to whom it has been returned: such claimants may, however, prevent his making a return of the thing by obtaining an order from the Court to that effect. Apart from such order, the bailee is safe in following the directions of his bailor. It has been already observed that the thing returned must be the identical thing originally delivered by the bailor; but it may happen that some profit or increase has accrued from it during the bailee's possession; as to such increase or profit the Act lays down the general rule, that it, along with the thing itself, belongs to the bailor in the absence of any contract to the contrary; and this rule is illustrated by the instance of a cow, which has given birth to a calf during the bailment, in which case both cow and calf must be ultimately delivered to the bailor. There are, however, cases in which, although there is no express contract to that effect, it is still obvious, from the nature of the bailment, that it was intended that the bailee should have the benefit of the profit. For example, in all cases of hiring it is clearly intended that the profits arising from use of the thing hired should be retained by the hirer; again, in case of loan, as of a cow, the borrower accepts it on the understanding that he shall enjoy the milk. In fact, it would appear

Duty of bailee
to return thing
bailed.
Ss. 163—166.

that the general rule can, as far as profits are concerned, be predicated only of those bailments where the purpose is simply safe custody. As to other bailments it is generally true that increase, such as that in the case of a cow with a calf, goes to the bailor, but the question, whether profits follow the same rule, depends entirely on the purpose of the bailment.

131. Having thus considered the obligation of the
Rights of bail-
 lee in respect of
 thing bailed.
 See. 158, 164,
 170, 171. bailee, we come next to certain provisions
 which give him rights in respect of the
 thing bailed, when he has incurred ex-
 pense or done work with reference to it.

First, if he has not bargained for any remuneration, provision is made for his reimbursement by the bailor of expenses which he has necessarily incurred for the purpose of the bailment. The nature of such expenses must depend on the purpose of the bailment: they may be incurred in the keeping of the thing, in carrying it, or in doing work upon it. If a carrier accepts goods for carriage, or a warehouseman accepts goods for safe keeping, the payment for which he stipulates is, of course, intended to cover any expenses which he incurs in discharging his duty with regard to the goods; but if he has stipulated for no remuneration, an obligation lies upon the bailor to refund to him the amount of such expenditure. The operation of this rule is, therefore, confined to creating an obligation in favor of the bailee, which in other cases the parties have created for themselves by contract. Another provision is made with reference to those bailments the purpose of which is to render some service to the thing bailed involving the exercise of skill or labor. The rule presumes the existence of a promise on the bailor's part to remunerate the bailee for such service, and it gives him, in addition, and as security for the performance of that promise, the right to retain the goods bailed until performance is duly made. Such a right of lien is analogous to that enjoyed by the vendor in respect of goods the

price of which remains unpaid, and it may be lost or waived in a similar manner. A tailor who has cloth given him to make up into a coat is entitled to retain it till he is paid for his services ; but, if he has given three months' credit for the price, he is considered to have waived his lien, because his promise to deliver the coat when made may be enforced immediately, whereas the obligation of the other party to pay is suspended. The object of this lien is to give the bailee a security in respect of the particular service rendered to the goods retained, and he cannot, therefore, claim to hold them as security for any other debt or obligation of the bailor. An exception is, however, admitted to this rule in favor of certain specified classes, *viz.*, bankers, factors, wharfingers, attorneys, and policy-brokers. A custom recognized in English law has given persons of these classes the right to retain bailed goods as security for a general balance of account, and that custom is recognized in this Act.

132. It remains to us to deal with the rights and obligations to which the finding of lost goods gives rise. If a person casually picks up a thing whose owner he has no means of knowing, he is not bound to incur any trouble or expense in finding the owner or in preserving the thing : any service which he so renders to the person who turns out to be owner is voluntary, and does not, therefore, form ground for a contract. The owner of lost property has the option of reclaiming it, or leaving it in the finder's hands. If he desires to reclaim it, he may offer a reward for its recovery, and then, in respect of the sum so offered, he becomes liable to an action at the suit of the finder, because a contract has been created between them ; but, where no offer of reward is made, the only right of the finder is to retain the thing as security for the reimbursement of his expenses. The terms on which the owner can exercise his right of reclaiming his property, are the payment of any expenses to which the finder has been put, and

Rights and duties of finder of goods.
Ss. 168, 169.

of the reward, if one has been offered to the finder. If, on the other hand, the owner does not choose to pay those charges, or if he cannot be discovered, the finder is entitled, when the thing is an ordinary object of sale, to sell it, if either it is in danger of perishing or losing the greater part of its value, or if his lawful charges amount to two-thirds of its value.

133. Having dealt with bailment generally, we next come to the consideration of the bailment of pledge, which is constituted by a delivery of goods as a security for payment of a debt or performance of a promise, the bailor in this case being styled "pawnor," the bailee "pawnee." It is true, with regard to pledge, as with bailments generally, that the character of the possession, and not the nature of the delivery, must be looked to ; because a person already in possession may become a bailee for hire or a pawnee, although there was originally no delivery to him by way of bailment. In this kind of bailment two facts require special attention, the one being that the existence of an unperformed promise on the pawnor's part is pre-supposed, the other that the pawnee has a power of sale conferred on him. The former fact distinguishes cases of pledge from transactions where something is delivered to a creditor in satisfaction of a debt ; the latter distinguishes a pledge from a mere lien such as that possessed by a warehouseman.

134. The pawnee's right of possession continues as long as the promise or any part of it remains unperformed ; if, therefore, the promise be to pay a debt, the pawnor must not only pay the debt itself, but also the interest of such debt, for that is part of the principal obligation : moreover, the security covers also the necessary expenses incurred by the pawnee in the preservation of the thing pawned, whether those expenses be ordinary or extraordinary. It may happen that the pawnee cannot avoid incurring such expenses, because, as will be remembered, it is his duty to take as

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much care of the thing as a man of ordinary prudence would, under similar circumstances, take of his own goods.

135. The pledge, having been made for a particular debt or promise, cannot be applied to a previous debt or promise, in respect of which the pawnee chances to be promisee. Subsequent advances, however, are deemed to stand on the same footing as the original debt; and the pawnee has, in respect of them, the same privileges; because it is presumable that the further credit was given on the strength of the pledge already existing. On the other hand, there is nothing to prevent parties making it a condition of the bailment, that the security shall cover all liabilities, past or future, which the pawnor has incurred, or is about to incur, in favor of the pawnee.

136. The giving of a pledge does not affect the antecedent debt, but merely presumes its existence; neither does it necessarily affect the pawnee or creditor's remedies for such debt. He has, therefore, two courses open to him.

As soon as the performance of the promise or payment of the debt is due, he may bring his action against the defaulting promisor, and at the same time retain the goods pledged as a collateral security; or he may, after giving reasonable notice of his intention, exercise the right of sale. Supposing him to adopt the latter

course, the proceeds of the sale in his hands extinguish the debt as far as they go; but for any portion of it which remains unsatisfied he still retains his original remedy. On the other hand, any surplus beyond the amount of the debt reverts to the pawnor. This power of sale cannot be exercised before the performance of the promise secured is due, nor without reasonable notice being given; but even after those two conditions are fulfilled, there is still reserved to the pawnor an opportunity to save the pawned article from sale, by an offer to perform the promise, made at any

Pledge cannot
be applied to
past debt.
S. 174.

Rights of paw-
nee on pawnor's
default, and
rights of pawnor
to redeem.
Ss. 176, 177.

Sale by paw-
nee.

time before the actual sale occurs. In order to effect this redemption of the pledge, the pawnor must also pay any expenses which may have arisen from his default. Thus the pledge is throughout made subservient to the object of securing the performance of the promise for which it is made. On the one hand the performance of that promise determines the bailment, except with regard to expenses incurred in preserving the pledge; on the other hand, the realizing of the security discharges the promise only to the extent of the amount realized. The power of sale under which the security is realized is the last resort, and must not, therefore, be exercised without due care for the interests of the pawnor; the pawnee, in fact, sells as trustee for the pawnor. If he sold on his own account and took the risks of the sale, he would not be holding the goods as pawnee at all: it would be a case in which something had been given in satisfaction of a debt.

137. Hitherto it has been assumed that the pawnor is one who enjoys an absolute right of ownership over the thing which he purports to deliver by way of pledge. Under some circumstances, however, a person, who has mere possession of goods or of documents of title to goods,—*e. g.*, bills of lading or warehouse-keeper's certificates,—may make a pledge which avails to confer on the pawnee all the rights attached to a valid pledge. The conduct of the pawnee must be of the same character as that required of a purchaser who accepts goods from one who has mere possession, that is to say, the pawnee must act in good faith, and under circumstances which are not calculated to make him suppose that the pawnor is acting improperly. Moreover, the consent of the real owner to the pawnor's possession is not essential to a valid pledge by the latter; but if the goods or documents have been obtained from the lawful owner by means of an offence or fraud, the pledge will be invalid. Again, a pledge may be made by a person who has, to the

Pledge by persons having limited interest.
Ss. 178, 179.

knowledge of the pawnee, a limited interest in the goods, such as a life-interest. In that case the interest which the pawnee takes is similarly limited, and is liable to be determined by the same circumstances as would determine his pawnor's interest, in accordance with the general rule that nobody can convey to another a better title than he himself possesses. Unless the pawnee's possession of goods is determined by the intervention of a rightful owner, he is entitled to retain it until the promise is performed. Upon the occurrence of that event, he must return the goods to the pawnor, or, according to his directions, in the same manner as any other bailee.

138. The wrongful act of a third person with regard to the thing bailed may either affect the interests of the bailee only, or it may also be injurious to the bailor: provision is therefore made for the protection of the interests of both parties. A person whose enjoyment of a thing bailed to him is impaired by an injury done to it by another, or who is deprived of it by another, is entitled to sue that other for such injury or deprivation; or the bailor himself may sue him; and it cannot be set up by way of defence in such a suit, that the plaintiff is in enjoyment of a limited interest only, and therefore not entitled to compensation to the full extent of the injury done, but only to an amount proportioned to the extent of his interest. On the other hand, the wrongdoer is saved from the vexation of having two suits brought against him, because the compensation obtained in a suit brought by either bailor or bailee is to be apportioned between them according to the extent of their respective interests.

139. Since it is impossible for each man to transact for himself all the business of ordinary life, the law generally allows him to be represented in the performance of his legal acts by another, and gives to acts done by such representative the same effect as they would have if done by himself.

Rights of bailor and bailee against wrongdoer.

Ss. 180, 181.

Agency.
Ch. X, s. 182.

The person who is so impersonated or represented is called the "principal," and the representative so employed is called the "agent."

140. The sphere of the Law of Agency is to define the relations which arise out of this service of impersonation, as well between the principal and the agent, as between each of them and the persons with whom the performance of the service brings them into contact. The agent may be regarded either as a mere instrument of communication between his employer and third persons; or he may be regarded as entering into a contract with his employer.

Who may be agent.
In the former view, his personal capacity to contract is immaterial, for the Act follows the rule of Roman and English law in holding that persons laboring under personal disqualifications for contract may yet exercise the functions of agents. Regarded as a contract between employer and employed, agency can be distinguished from other contracts only by the circumstance that no consideration is necessary for its validity; this distinction is more

S. 184.
S. 185.
apparent than real, for, on the one side, the service to be performed, on the other the credit gained by the fact of being allowed to perform the service, may be regarded as the consideration for the reciprocal promises.

141. The rights and obligations which flow from this contract will be considered hereafter; at present we have to deal with the two modes in which the principal's responsibility to third persons is effected. Responsibility for the acts of another may arise, either from previous authorization, or from subsequent adoption of the service in respect of which the liability is sought to be enforced. Authority may either be announced in express terms, or it may arise by presumption based on the general course of trade, on the nature of the circumstances, or on the relations existing between the parties concerned. Thus, an authority to pledge the responsibility of the family for necessary

Agency how created.

Ss. 186, 187.

purposes may be presumed from the domestic relationship in which the parties stand to each other.

142. Assuming that the authority exists, however originated, the next question is, what are the common attributes which the law attaches to it? The first rule is that authority to do a particular service extends to all things necessary for its performance; and when the service consists, not of one act, but of a series of acts, such as a business, then the authorization extends to what is usually done in the course of the designated business. A further extension is given to the agent's powers, and, therefore, to his employer's responsibility, when in the course of the service such extraordinary circumstances arise as demand special remedies or precautions. The only restraint then imposed upon the agent is, that he should act in the same manner as that in which a man of ordinary prudence would act under similar circumstances, supposing that his own personal interests were at stake. Nothing can be more opposed to the original object of the agency than that the master of a ship, who is commissioned to navigate her to a certain port for a certain purpose, should in the course of the voyage sell her to a stranger; but a state of things may occur, in which no other course consistent with the interest of the owner could be pursued. In the event of a sale upon such an emergency, the responsibility of the owner would be the same as if he had expressly ordered it. With regard to these, as to all other, general rules which may be used for testing an agent's power and a principal's responsibility, it must be remembered that their operation is superseded by any express announcement made to third persons, which may either have the effect of curtailing or enlarging them.

143. We now have to notice a rule which imposes a limitation on the manner in which an agent's authority may be exercised. That which an agent has been deputed, and has undertaken, to do himself, he may not employ another to

Extent of
agent's author-
ity.
Ss. 188, 189.

Sub-agents.
Ss. 190—195.

do for him. The reasonableness of this rule is apparent when it is considered that in most cases the personal qualities of the agent influence the principal's selection of him as a representative. A principal may have perfect reliance on the judgment, integrity or skill of A; but it does not follow that he has the same confidence in the qualities of B, to whom A would transfer the business entrusted to himself. Apart from the cases in which the principal gives

When agent's authority may be delegated. his agent either express or implied authority to employ another person as sub-agent in the transaction of the proposed business, there are two classes of circumstances which take certain agencies out of the operation of the general rule. It may be the custom of the trade upon which the agent is engaged to employ a sub-agent; or the nature of the agency may be such as to necessitate a delegation of the agent's authority. In such cases the original agent may employ another person in the business of the agency, and such person acts

S. 191. under his control and is called a sub-agent.

In so far as the object and result of the agency is to make the principal a party to a contract with third persons, the intervention of a sub-agent makes no difference, for the acts of the latter are regarded as those of the agent. The principal is bound by them and responsible for them; and the agent, on the other hand, incurs the same obligations in respect of them towards his principal as if they were his own acts. The sub-agent is in no way responsible to the principal under the contract; but he may, of course, like any other wrongdoer, become liable to him for damages in case of fraud or wilful wrong.

144. In a word, the relation of the sub-agent to his immediate employer, the agent, is the same as that of the agent to his principal. If, on the other hand, a sub-agent is appointed by an agent who has no authority to make such an appointment, the act, being in excess of

Relation of
sub-agent to
agent.

S. 192.

his authority, does not affect the principal with responsibility. Such a sub-agent is a complete stranger to the principal; he does not represent him; he cannot make him responsible to third persons for his acts, nor is he himself responsible to him. The agent

Rights and liabilities of agent who delegates without authority.

who without authority appointed him, alone incurs responsibility for his acts, and alone can enforce the obligations arising out of the contract of agency existing between them.

It is important to avoid confusion between sub-agents properly appointed and other persons who hold a somewhat similar position. A person does not become a sub-agent simply because he is appointed by an agent having authority to name another person to act in the business; for the question is, not by whom is the person nominated, but under whose control does he act. One who is named by an agent to act in some branch of the business of the

Distinction between sub-agent and other persons named by agent.

Ss. 193-195.

agency, independently of the agent who names him and under the directions of the principal, does not occupy the position of sub-agent, as the term is understood in the Act; and the importance of the distinction

appears when a question arises as to the parties to an action in respect of defaults of which a sub-agent, in the one case, and the nominee of the agent, in the other, has been guilty. In the former case, the principal may pursue his remedy against the agent, who in his turn may hold the sub-agent responsible; in the latter case, the nominee is directly responsible to the principal for his default, and the agent by whom he was named incurs no responsibility, provided he has discharged the duty cast upon him by his commission, namely, of exercising such discretion in the selection deputed to him as a man of ordinary prudence would have exercised in his own case. In the one case, the liability of the appointing agent is simply that which every one incurs

who employs another to act on his own behalf, in the other, his duty is confined to the exercise of discretion in the selection of the nominee.

145. There is another mode in which one person becomes fixed with responsibility for the acts of another. Although a man may be without any actual authority to do an act on behalf of another, the subsequent adoption of the act by that other has all the effects of previous authorization. But he is under no obligation to ratify the act, and may, if he chooses, decline any responsibility in respect of it. Questions, therefore, arise as to which course has been taken in a particular instance. As a person, in ratifying, is not allowed to accept one part and reject another part of the transaction, any conduct which evinces an intention to assume the benefit of one unauthorized act which formed part of a series, is taken to indicate a ratification of the whole series. In order, moreover, to make this ratification valid, it must be shown that the person ratifying had a full knowledge of the advantages and disadvantages of the transaction which the volunteer has entered into on his behalf, for otherwise he could not be said to have had a fair opportunity of judging between the alternative courses open to him.

146. There is, however, a class of cases which forms an exception to the general rule that an act unauthorized, but subsequently ratified, is followed by the same effects as an act done by an authorized agent, the exception being necessary for the protection of third parties. In the first place, where the unauthorized act would, if authorized, expose a third person to an action, no subsequent ratification can give it that effect. A bailee, for instance, who has promised to return the thing bailed on demand is liable to an action on default; but if the demand is made by a stranger who purports to act for the bailor without being authorized so to do, the bailee is justified in treating such demand as null and void, and

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subsequent ratification by the bailor will not validate it. It would clearly be unjust that the bailor, by subsequently approving of the volunteer's act, should be enabled to claim damages against the bailee for a refusal to deliver, which at the time was not wrongful. On the same principle, where an act purports to terminate the right or interest of a third person, it cannot be allowed to operate unless it was at the time done on behalf and with the authority of the principal who had the power to terminate such right or interest. The result of a contrary rule would be, that the one party might be in a position to treat the interest as determined or not, as he chose, while the other would be uncertain as to the effect of the unauthorized act. Thus a lessor, if he might by ratifying take advantage of a notice to quit given by a stranger, might also, if he chose, repudiate it; and his lessee would be forced to remain in suspense, uncertain whether the notice to quit was to be enforced against him or not.

147. Next we have to deal with the modes in which, and the conditions under which, the agent's authority may be determined. Several modes are specified in the Act. The principal may revoke it, or the agent may renounce his office. The completion of the business, or the fact of either party dying or becoming of unsound mind, also operates to determine the authority; and, lastly, it is determined by the circumstance of the principal being adjudicated an insolvent. The first rule limiting the operation of these modes of determination is, that, where the agent himself has an interest in the property which forms the object of the agency, the agency cannot be terminated to the prejudice of such interest, either by the revocation of the principal, his insanity, or his death. An authority given under such circumstances is regarded as merely auxiliary to the interest which the agent takes in the property with which the agency is concerned; and, therefore, as the interest itself cannot be resumed by the principal, it follows

that that which is accessory to such interest is equally irrevocable. Thus, if A, being indebted to B, consigns to him cotton and desires him to sell it and repay himself out of the proceeds, the power to sell conferred on B is really part of the interest in the cotton consigned to him, for without that power B would be unable to realize the interest assigned to him. The power and the interest therefore stand on the same footing, and both are irrevocable. Besides this limitation, the only other which is imposed on the power of the principal to revoke the authority given to an agent, is in respect of the time at which such power must be exercised.

Time of revocation.

§s. 203, 204.

Until some transaction has been effected by the agent, upon which the principal or the agent on his behalf may sue and be sued, an option rests with the principal at any moment to revoke the power which he had conferred on his agent. But as soon as any act has been done by the agent which binds the principal, the power to revoke can no longer be exercised by the principal, so far as regards the obligations which arise from the act which has been so done.

148. This option, however, as well as the corresponding option of the agent to renounce, must be

Principal or agent entitled to compensation if authority is unduly renounced or revoked.

§s. 205, 206.

exercised under certain conditions, or it will entail liability for compensation in favor of the other party. If there is an express or implied contract that the agency should be continued for any particular period, any previous revocation or renunciation, as the case may be, entitles the party against whom it is made to compensation, unless it be made with sufficient cause.

§. 208.

Another rule limits the effect of the principal's act in determining the agent's authority, by making its determination date, not from the time of the event itself, but from the time that it becomes known either to the agent himself or to third persons with whom he deals, whosever's interests may happen to be concerned.

149. All the responsibility which a person assumes by allowing himself to be personated by another extends to his representatives, and may be enforced against them by any one who might have enforced it against the deceased. At the same time the agent is not at liberty, immediately upon the death of his principal, to divest himself of all further concern about his principal's affairs; he is bound to take all reasonable precautions for the preservation of his principal's interests, and the representatives of the deceased may hold him responsible for any default.

Duty of agent on death of principal. S. 209. 150. The rights and obligations which arise between principal and agent have now to be considered. The agent's authority may be expressly defined by the directions under which he acts, or it may depend upon the custom of the business which he is employed to conduct. The common attributes which are generally attached to an agent's authority have already been stated. Such powers being vested in him by his appointment, it is his first duty to exercise them in accordance with his principal's directions, or in accordance with usage, which often takes the place of express directions; and any loss which may arise from his neglect of this duty must be borne by him, while for any profits which may accrue he is accountable to his principal. He cannot claim the profits, because they have arisen from his own wrongful act; nor can he claim immunity from the loss by alleging that it might have occurred, even although he had not deviated from his instructions.

Skill required of agent. S. 212. 151. As long, however, as the agent acts in accordance with his instructions, his responsibility is less extensive. The fact of a person's offering to perform any given service is *prima facie* a notification that he holds himself out as one who possesses the requisite skill and experience to perform the service with reasonable efficiency. If, therefore, the interests of his principal suffer from the agent's want of such

skill, or from his negligence or misconduct in the performance of the service, he is bound to make compensation: but it must be shown that the damage complained of is directly and immediately the consequence of the alleged default; for the agent does not assume an absolute responsibility, such as is undertaken by the insurer who contracts to indemnify another against all losses of a particular class, however occasioned. An agent may defend himself against an action at the suit of his principal by showing that, though he has been negligent, and though his principal's interests have suffered, yet that the mischief was immediately occasioned by the happening of some event for which he was not responsible.

152. The appointment of an agent necessarily implies that some confidence is reposed in him by his principal, and the law takes every precaution to insure that this confidence is not betrayed, by obliging the agent to keep his principal acquainted with all the circumstances of the business delegated to him, by forbidding him to avail himself of his fiduciary position to his own profit, and by declaring him, in the case of misconduct, disentitled to receive the stipulated remuneration. It is the right of the principal to demand, and the duty of the agent to give, complete accounts with regard to the business entrusted to him.

At the same time the acceptance of the agency does not absolutely disqualify the agent from himself taking the position of contractor towards his employer. The law does not go the length of avoiding a transaction between persons so related; but it requires, in the first place, that the agent should acquaint his principal and obtain his consent to his dealing in the business on his own account; and, secondly, that he should disclose to the principal, fairly and honestly, all that he knows about the matter, and should not seek surreptitiously to secure any advantage to himself. If the principal is not informed of the cha-

Duty of agent to
render accounts.
Sa. 213, 214.

Contracts be-
tween principal
and agent.
Sa. 215, 216.

racter in which his agent is acting, and of the personal interest which he has assumed, and if the principal's own interests have suffered by the concealment, or if there has been any want of good faith on his agent's part, the principal is entitled to repudiate the transaction and to be replaced in his original position. On the other hand, it is open to the principal, on discovering the part which his agent has been playing, to claim for himself the profit or other advantage derived by his agent from the transaction; for the agent is not entitled to keep to himself advantages which he was commissioned to procure for another. If his duty is to receive money, he is bound to pay it over to his employer;

but in respect of all sums coming into his hands for that purpose, he has a right of recouping himself to the amount of his disbursements and the commission due to him. The same right of lien extends to all other property, of whatever nature, which is received by him from or on account of his employer. He cannot, however, sue for his commission until the service has been completed, and if he is guilty of misconduct he may forfeit his claim to it altogether.

153. It is further necessary for the agent's security that he should be protected against the unskilfulness or negligence of his principal, and be held harmless from liability to others in respect of the acts which he is commissioned to perform. If, therefore, a servant sustains

Agent's immunity.

S. 225.

Sa. 222—224. some personal injury which is wholly attributable to his master's carelessness, he is entitled to compensation; if he himself does to another an injury which is the consequence of his service and not of his own negligence, then he is entitled to be indemnified against the damages to which he becomes liable. His right to this indemnity does not, however, arise if he was a conscious agent of wrong in committing the injury complained of, still less if there was any criminality in the act.

154. The Act next deals with the relations which arise

Relation
between prin-
cipal or agent
and third per-
sons.

S. 226.

out of the service of agency, as between the principal or the agent on the one hand, and third persons on the other. These relations may be best exhibited by stating the special classes of circumstances under

which the general rule of agency is inapplicable; that general rule being that the act of a properly appointed agent, done within the scope of his authority, affects his principal with the same responsibility, and gives him the

General rule
of agent's irres-
ponsibility and
principal's
exclusive res-
ponsibility.

same rights, as he would have if he had been acting in person, and at the same time affects the other contracting party with the same responsibility, and gives him the same rights, as if he had been

dealing with the principal in person. In accordance with this rule the agent is the mere instrument of the principal. His intervention places neither his employer nor the other contracting party in a more favorable position than that which they would otherwise occupy. His employer cannot allege that he was ignorant of anything which was actually communicated to the agent in the course of his service;

Ss. 229—238.

nor can he disavow any statement made under the same circumstances by his agent,

although the statement be of a fraudulent character, or one which the agent was forbidden to make. In any case in which it might be important for a contractor to establish that the other party had notice of some fact, or had made some statement, his purpose would be gained by proving such notice or statement with regard to the agent of that party. The only question which can arise, where the responsibility of one man for the act of another is thus asserted, is whether the agent was acting within the scope of his authority.

It has already been stated (a) that authority may be

(a) Para. 142.

announced in express terms, or may arise from certain presumptions. A presumption of authority also arises, where the person to be affected with responsibility has by words or conduct induced others to believe that such authority did in fact exist; for though it may be clearly shown that no relation of principal and agent in fact existed, yet it is contrary to the policy of the law to allow a man to deny the truth of representations which he has made to another, when the latter has given credit to them and acted accordingly. If the transaction

is entire and indivisible, and in any part of it the agent has exceeded his authority, the principal is entirely free from responsibility; if one of a series of separate acts of the agent is unauthorized, his responsibility in respect of the rest is unaffected.

155. It remains now to state the exceptional cases in which the consequences of agency, as stated in the last preceeding paragraph, are modified by circumstances. Apart from the cases where an agent is estopped by a rule of evidence from denying his liability on a contract—as, for instance, where he has signed the contract with his own name and without the addition of any qualifying words—there are cases in which the general rule above stated would operate unjustly and disappoint the expectation of the parties. The irresponsibility of the agent, and the exclusive responsibility of the principal, in respect of contracts entered into by the agent, would sometimes practically result in the contracting party being left without any means of enforcing his rights; in such cases the law presumes that it was the intention of the parties that the general rule of the agent's irresponsibility under contracts made by him on behalf of his principal should not prevail. In the following cases, accordingly, it is presumed that the person contracting with an agent has bargained for the agent's responsibility under the contract, and at the same time made himself liable to the

Presumption of agent's responsibility.

S. 230.

agent, just as if he were making the contract on his own behalf—

- (i) when the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad :
- (ii) where the agent does not disclose the name of his principal :
- (iii) where the principal, though disclosed, cannot be sued.

156. In the first two cases, the person contracting with the agent does not forego his rights against the principal, but is entitled, in case of breach, to pursue his remedy either against him or against the agent. In the third case, the contractor relies solely on the responsibility of the agent, and in the first case, he may be regarded as practically doing so. The second case requires further consideration, for it is the one under which the greatest complications and difficulties arise. The agent may either omit altogether to announce that he is an agent, or he may merely omit to announce the name of his principal. A contractor dealing with one whose representative character he does not know is entitled, upon discovering the principal's name before the contract is completed, to repudiate the contract if he can show that he would not have entered into it had he known who the principal was, or had he known that the agent was not a principal. On the other hand, the contracting party is entitled in such a case, if the principal intervenes for the purpose of enforcing his rights, to set up against him any defence

Sa. 231, 232. which he might have set up against the agent: for it would be inequitable to deprive him of the benefit of rights upon the strength of which he may have embarked on the transaction. He may have trusted the agent upon the ground of previous dealings which had passed between them; and, supposing that these dealings resulted in a debt to himself, which he might have set-off in a suit brought by the agent, he is not the less entitled to assert this counter-claim when the suit is brought against him by the disclosed principal.

The contracting party being entitled in the alternative to sue either principal or agent must make his election, and if he induces one of them to believe that he is going to hold the other exclusively responsible on the contract, he cannot afterwards turn round and sue the party to whom such representation was made and who has meanwhile been acting upon the faith of it. Thus, if the conduct of the party contracting with an agent has been such as to lead the principal to suppose that the agent alone is to be held responsible on the contract, the principal may so deal with his agent and so alter his position with regard to him as to deprive himself of means of reimbursing himself in the event of a suit being brought against him personally. In such case, therefore, the effect of the contractor's conduct is to discharge the principal from responsibility.

157. In the case where a person represents himself as acting for another, whereas he has no authority, but is really acting on his own account, there is no agency, and no contract is created between the supposed principal and the third party, or between the pretended agent and the third party. There is, therefore, no right which can be enforced against the third party, and the only obligation resulting from the transaction arises in his favor out of the wrong which he has suffered at the hands of the person calling himself an agent. The untrue representation which induced him to enter into the transaction is ground for a suit against the person who made it to recover the damages which he may have sustained in consequence of the want of alleged authority.

158. The class of contracts lastly dealt with in the Act is that of partnership, which naturally succeeds in order that of agency, because it is a product of the same commercial necessities, and also has many characteris-

Liability of one who untruly represents that he has authority from another.
Ss. 235, 236.

Chap. XI. Facts implied in partnership.
S. 239.

tics in common with it. The existence of a partnership ordinarily implies three things, viz., co-ownership, agreement to share profits and losses, and co-operation towards a common object, which is effected by each partner investing the other with authority to act as his agent in the agreed business. It is this relation of agency which distinguishes a partnership from simple co-ownerships on the one hand, and agreements to share profits on the other.

159. There are certain agreements of the kind last mentioned as to which it is expressly provided in the Act that the mere participation in profits is not to constitute a partnership. The mere fact of a person taking a share in a firm's profits, either in the shape of remuneration for services, or of interest on a loan, or of an annuity, neither entitles him to take part in the business, nor subjects him to liability for the firm's debts. The lender, who receives interest on his loan varying with the rate of the partnership-profits,—the servant who takes a share of the profits as his remuneration,—the retiring partner or his widow, who takes a proportion of profits by way of annuity, all resemble each other in this, that they do not constitute the partners of the firm their agents to carry on a business, and, therefore, they incur no liability. When any of these classes, for which express provision is made, are concerned, the sharing of profits is thus in effect declared to be no evidence of a partnership; whereas in other cases it is evidence of such a relation, though possibly insufficient of itself to establish it.

160. Not only is agency the real test of a partnership, but it has also the effect of assimilating relations which are not intended to be real partnerships to such contracts. Persons may be liable as partners without really being partners; and they are so liable, because they have either represented themselves, or allowed themselves to be represented, as partners. Conduct on the part of any person,

Cases where sharing of profits is not evidence of partnership.

Ss. 240—244.

Relations resembling partnership.

Ss. 245, 246.

which leads the world to believe that he is partner with another, will entitle those who have dealt upon the faith of that belief to treat him as such. The common instance of a man holding himself out as partner without really being so, is when a man allows his name to be used in a firm of which he has ceased to be a member. The question in all such cases is, whether credit has been obtained by means of the name of the person who is sought to be charged. Any evidence which goes to show that he authorized others to act for him, is relevant towards the establishment of his liability as a partner; and on the other hand, evidence that those who seek to charge him had notice that he was not really a partner, or that he had ceased to be so, is relevant to disprove his liability.

161. The next question is as to the capacity of persons to become partners. Though the general rules of capacity govern this, as they do other contracts, they are in some measure qualified by the nature of the object-matter. Every minor is restricted by the general rule from involving himself in the obligations of contract, because he is presumed not to have capacity to form a competent judgment as to his own interests; but it is practically necessary to make provision for a state of things of ordinary occurrence, the presence, namely, of minor partners in a firm. The law, therefore, says that a minor may become a partner, as it were, with a limited liability. He may become a partner so far as to derive benefits from the concern, and so far as to make the actual share which he has himself contributed to its capital liable for partnership-debts. There, however, the minor's liability is to cease: he is exempt from personal responsibility, and preserves the rest of his property exempt from partnership-claims, just as he would in the case of any other agreement. If the firm is dissolved, his share of the capital, like that of the other partners, must first be devoted to the liquidation of the firm's debts, and he will then take his share of the balance

Minor's capacity for partnership.

§s. 247, 248.

remaining in the shape of profits. If there be no balance or a deficit, he has lost what he chose to contribute, just as he might lose it by paying it away for any other purpose ; but neither his fellow-partners nor those who dealt with the firm have any further claim on him or his property.

162. Should, however, the firm not be dissolved before the minor comes to the age of majority, it is incumbent upon him, if he desires to free himself from the obligations of the firm, to give, within reasonable time, public notice of his repudiation of the partnership. If he fail to give such notice, his position towards the firm and its creditors is that of a principal who has ratified acts done on his behalf by an unauthorized agent. Accordingly, all the obligations which the firm has incurred since he became a member of it are considered to have been incurred on his behalf and to have been ratified by him. His responsibility in respect of them, therefore, becomes identical with that of his co-partners.

163. What this responsibility is, we now have to consider. Here, again, the answer to the question is found in the law of agency. Each partner is considered to be endowed with authority to act for the firm in the usual and necessary course of its business ; and the liability of all, in respect of such lawful acts, is the same as if they were actually done by the particular partner sought to be made liable. It follows that obligations incurred on behalf of the firm before any given partner entered the firm, not having been incurred with his authority, cannot be enforced against him ; nor is he deemed, by the fact of entering the firm, to ratify such acts, because the principle of ratification does not, as we have seen, apply unless the act ratified was done on behalf of the person who is alleged to have ratified it.

164. For everything which any one partner does in the necessary or usual course of the firm's business, whether it result in contract with third parties, or whether it be in the nature

Liability of minor partner on attaining majority.

S. 248.

Authority of partner.

Ss. 249—251.

Responsibility of partner.

of fraud or negligence towards third parties, all the members of the firm are responsible as if the particular act charged or complained of had been done by an agent duly appointed by them for that purpose. At the same time an agreement entered into between the members of the firm, restricting any of them in the conduct of the business, is not entirely ineffectual to prevent the other members from being involved in transactions not authorized by them; for third parties who have notice of such an agreement are not entitled to hold the partners responsible for acts done by any of their co-partners in contravention of it.

165. Such an agreement, or any other regulating the rights and obligations of the partners among themselves, when once entered into, cannot be altered or annulled at the will of any one partner; the promise contained in it binds each reciprocally like any other promise. It can therefore be discharged or varied only by the consent of all parties; acquiescence, however, in a uniform course of dealing inconsistent with the maintenance of the agreement may be sufficient evidence of common consent to annul it.

Annulment of
agreement be-
tween partners.
S. 252.

166. Certain general rules are laid down in the Act by which, in the absence of any contract to the contrary, the relations of partners will be governed. These have now to be considered.

General rules
governing rela-
tions of partners.
S. 253.

A partnership, we have seen, generally implies co-ownership of property. The property so held by a firm is composed of the shares which the several members have contributed, and is called the partnership-property or capital.

Partnership.
Capital.

The profits or losses which result from the dealings with this partnership-property are divided equally among the partners irrespectively of the amount of their original contributions; but, on a dissolution taking place, as soon as the debts are paid off, each partner's share of the property is measured by the value of his original contribution. The rule of equality, therefore, obtains in distributing profits and losses; the rule of proportion in the distribution of the capital.

167. As, on the one hand, each member of a firm has a right to take part in the common business ; so, on the other hand, is he entitled to call upon every other member to attend diligently to the same business, without claiming any remuneration for his services. In other words, the contract of partnership contains reciprocal promises to that effect.

Rights of partners with regard to business.
S. 253.

Further, the community of interest involved in a partnership also requires that all the members shall do their best to carry on the business to the common advantage, and that they shall be just and faithful to each other, accounting for all benefits received from transactions connected with the firm's business, and imparting to each other the fullest information with regard to any matters affecting it.

Duties of partners to each other.
S. 257.

168. It is obvious that these duties could not be properly discharged by any partner who was himself on his own account carrying on a business which competed with that of the firm. In the event, therefore, of any partner committing such a breach of duty, the Court will compel him to account for any profits derived from such business, and to compensate his co-partners for any loss occasioned to the firm thereby. These reciprocal obligations are no more than the nature of the partnership-relations necessitates, and may be summed-up in the proposition, that the most perfect good faith must be preserved.

Partner carrying on other business.
Ss. 258, 259.

169. We have seen that agreements among partners, as to the mode of regulating their rights and obligations among themselves, cannot be altered except by common consent. Still less can the nature of the business be in any way changed without such consent ; but in the event of differences arising as to ordinary matters within the range of the firm's business, the decision of a majority is binding upon all. As no change can be made

No change in business or constitution of firm except by consent of all.
S. 253.

in the object of the partnership-contract except by means of a new agreement between all the parties, so also a fresh agreement between all parties is necessary for the introduction of another person into the partnership. Such an introduction makes, in the eye of the law, a new firm, and the new partner does not by the fact of his introduction assume any part of the liabilities of the firm as it existed previously to his entering it. As between him and his co-partners, the firm may be regarded as having a continuous, unbroken existence, and it is so regarded in the mercantile world and for the purpose of mercantile accounts; but, as between the members of a firm and third parties, the law merely enquires, who were the individuals composing the firm at the time when any given obligation was incurred, and against them, and them only, can it be enforced.

170. In this place it is convenient to mention other consequences which flow from this legal view of the nature of a firm. The principle upon which is founded the proposition, that an incoming partner does not make himself liable for the firm's debts incurred previously to his entering it, is also the foundation of the rule that the estate of a deceased partner is free from all obligations incurred by the surviving members after his death. In the former case the authority to incur has never been given; in the latter it has been withdrawn.

171. Another consequence of the legal view of a firm is that any change in its constitution revokes a continuing guarantee, given either to it or in respect of its transactions. The surety who either secures a firm's debts, or becomes security to a firm, so binds himself on account of the confidence which he reposes in its existing members, A, B, and C; but if D, a person of whom he knows nothing, or whom he distrusts, is introduced into the firm, his position as a

Consequences
of partnership-
relation.
S. 261.

Effect of
change in firm
on continuing
guarantee.
S. 260.

surety may be materially altered, and he is accordingly discharged. These characteristics of ordinary partnerships are important as distinguishing them from extraordinary partnerships.

S. 266. Extraordinary partnerships, such as incorporated societies or limited liability companies. These are regulated by their own special laws, and in no way affected by this Act.

172. In considering the circumstances which lead to the dissolution of a firm, the distinction must be observed which exists between partnerships entered into for a fixed term and those entered into for an indefinite term; for upon the character of a partnership in this respect depends to a great extent the facility of dissolving it. There are, however, some circumstances which put an end to both kinds of partnerships alike.

Dissolution of partnership. Distinction between partnership for fixed time and partnership at will.

The fact of its business being prohibited by law, or the circumstance of the death of any partner, has the effect of dissolving the firm, and putting an end to all the obligations between the members which its existence involved, except in such matters as are necessary for the winding-up of the business.

Facts occasioning dissolution of all partnerships. **S. 253 (10), 255.**

If the partnership be for an indefinite term, any partner may retire at his will, and such retirement has the same effect on the firm as a death : for the rule holds good of all partnerships alike, that the fact of any member of a firm ceasing to be a partner dissolves the whole partnership.

Partnership at will. **S. 253 (8).**

173. As to partnerships which are made for a fixed term, it is obviously inconsistent with their constitution that any member should be at liberty to withdraw at his pleasure. Each partner has bound himself to continue the partnership-business for a certain time, and these promises are, like the promises as to the nature of the

Facts occasioning dissolution of partnership for fixed term.

business, reciprocal. They cannot, therefore, be discharged except by common consent. There are, however, circum-

Dissolution stances under which, although a member of
through Court. a firm cannot of his own free will dissolve it,

S. 254. he can, through the intervention of the Court, effect that object. The intervention of the Court may be sought for the purpose of releasing the party who applies for it, or for the purpose of expelling some other partner; but in either case the result of a successful application must be to dissolve the whole partnership, because the firm is no longer composed of all its original members. The Court will, at the suit of any partner, dissolve a partnership on any member of it becoming of unsound mind, or in any way incapable of performing his part of the contract, or if the business can only be carried on at a loss. In these cases the application may be made by any member indifferently; but in the following cases the application must be made by some partner other than the one whose conduct or circumstances are put forward as the ground for obtaining a dissolution. Thus, if one partner is adjudicated an insolvent, any of his co-partners may apply to the Court for dissolution. So, if a partner has done any act which has the effect of transferring his interest in the partnership to a stranger; or if a partner has been guilty of gross misconduct in the partnership-business or towards his partners, a dissolution may be obtained at the suit of any other of the members of the firm, but not upon his own application.

The effect of these provisions is to permit any partner to put an end to a partnership made for a fixed term, in the event of certain circumstances happening, for which he is not immediately responsible, or which are not within his control; but he is not permitted to put forward, as grounds for dissolution, acts for which he is himself responsible, and so, through the medium of the Court, indirectly to obtain the determination of his contract, which he has by the contract precluded himself from effecting directly.

174. It remains only to consider the circumstances which attend a dissolution. The partnership-property or capital consists, as has been

Rights of parties on dissolution.

S. 262.

observed, of the aggregate of the shares contributed by the members. Both the members of the firm and its creditors are entitled to have this capital, in the first place, devoted to the liquidation of the partnership-debts: if any balance remains after such liquidation, each partner or his separate creditors are entitled to his share of it; but if, on the other hand, there is a deficiency, then the partnership-creditors are entitled to such part of the private property of each partner as remains after he has paid his separate debts. In the distribution of the partnership-assets, the separate creditors of any partner cannot compete with those creditors who gave credit to the firm; in the distribution of the separate assets of a partner, his separate creditors have the priority, and the surplus only can be claimed by the partnership-creditors.

175. After dissolution, the power conferred by each partner on the other, to bind him by acts within the scope of the business, being

Rights of parties on winding-up of business.

withdrawn, no new obligations of the character contemplated by the partnership can be incurred; but many matters may still have to be transacted in the way of getting in the firm's debts, realizing its property, and generally winding-up the partnership-business. For

Rights and duties of partners after dissolution.

S. 263.

the purpose of transacting this business, the rights and obligations of the partners remain as if the partnership were still in existence; and, if the death of a partner has been the cause of dissolution, his representatives, though they have no right to interfere in the transaction of this business, are entitled, as against the surviving partners, to all the other rights which belonged to the deceased partner. They are accordingly entitled to have the partnership-property appropriated to the liquidation

of partnership-debts, to have the business wound-up in the most advantageous manner, to have full accounts and information with regard to the firm's business rendered to them, and generally to be treated with the good faith which is required among partners. Moreover, it is open to the

Power to ap- representatives of a deceased partner, as
ply to Court. it is to any partner after the termination

S. 265. of a partnership, to apply to the Court to wind-up the business and distribute the assets; such intervention of the Court, however, will make no difference in the rights and obligations of the parties; these will, so far as they are not modified by contract, be regulated by the rules which have already been stated.

THE INDIAN CONTRACT ACT.

ACT No. IX OF 1872.

This Act of the Governor-General of India in Council received the assent of His Excellency the Governor-General on the 25th April, 1872.

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THE INDIAN CONTRACT ACT.

(ACT IX OF 1872.)

WHEREAS it is expedient to define and amend certain
Preamble. parts of the law relating to contracts ;
It is hereby enacted as follows:—

PRELIMINARY.

Short title. 1. This Act may be called “The
Indian Contract Act, 1872.”

Extent. It extends to the whole of British India (1), and it
Commencement. shall come into force on the first day
of September, 1872 (2).

[(1) The Act is defined as extending to the whole of British India. It is applicable in all Courts and to people of all races within the British Territories (a). Questions as to its applicability to contracts made wholly or partially out of British India, or by parties not domiciled therein, or in respect of an object-matter not within British India, or not intended to be performed within its limits, must be decided by the rules of private international law. Such questions are of frequent occurrence; a merchant in London, for instance, requests a merchant in Calcutta to buy goods for him and to make the necessary advances; or two Englishmen in India make a bargain to be carried out in England, or about property situated in England; or a man sues in Calcutta on a promissory

(a) *Madhub Chunder Poramanick v. Rajcoomar Doss*, 14 B. L. R., 76.

note drawn at Paris ; or, to take a more complicated case, a man may make his contract in India, be domiciled in England, the contract may be intended to be carried out in France, while the object-matter of the contract may be in Germany. Now, in all cases of this character, if the contract is sued on, the question arises, under the law of which of the countries concerned is it to be deemed to fall ?

The following proposition is presented by Wharton (a) as the result of the best authorities : " Obligations in respect to the mode of their solemnization are subject to the rule *locus regit actum* ; in respect to their interpretation, to the *lex loci contractus* ; in respect to the mode of performance, to the law of the place of performance. But the *lex fori* determines when and how such laws, where foreign, are to be adopted, and in all cases not specified above supplies the applicatory law."

First, as to the formal requirements of a contract, those which are demanded by the law of the place where it is made are sufficient and necessary for its validity everywhere. Thus if for want of a stamp a contract made in a foreign country is void there, it cannot be enforced here (b). A distinction, however, must be made between Statutes declaring that the absence of some requirement shall make the contract void and those which preclude an action from being brought or evidence from being admitted unless some requirement has been satisfied. Statutes of the latter kind have force only if they are part of the *lex fori*. If the want of a stamp makes a document inadmissible in evidence according to the law of a foreign country where the document is made, an English Court will admit it notwithstanding (c) ; and where an English Statute, such as the Statute of Frauds, declares that no action shall be brought upon contracts of a certain class, unless reduced to writing, an English Court will not entertain an action brought upon such a contract, if it be unwritten, although no writing were required by the law of the place where the contract was made (d). Forms prescribed by such Statutes

(a) Wharton's Conflict of Laws, § 401.

(b) *Bristow v. Sequeville*, 5 Ex., 275.

(c) *James v. Catherwood*, 3 Dow. & Ry., 190 ; *Ex parte Melbourne*, L. R., 6 Ch., 64.

(d) *Bain v. Whitehaven*, 3 H. L. O., 1.

are not constituent parts of the transaction itself, but are necessary merely for the enforcement of the remedy. Those Statutes on the other hand which declare that, in the absence of a given form, the transaction shall be void, make that form an essential requisite of the transaction.

The law of the place where the contract was made will also generally govern its interpretation. In construing contracts made in a foreign country, the Courts look to the meaning attached to them by the law of that country; and a policy of insurance executed in England on a foreign ship for a foreign owner and a foreign risk, will, nevertheless, be deemed an English contract, and interpreted as such. "Suppose," says Judge Story, "a contract for the payment of the debt of a third person in a country where the law subjected the contract to the tacit condition that payment must first be sought against the debtor and his estate, that would limit the obligation to a mere accessorial and secondary character; and it would not be enforced in any foreign country except after a compliance with the requisitions of the local law. Sureties, endorsers, and guarantees are, therefore, liable everywhere only according to the law of the place of their contract"(a).

But this rule does not apply where the contract is intended to be performed in another country. When two persons enter into a contract in one country with the intention that it shall be performed in another, it may generally be presumed that they mean to adopt the language and usages of the latter country. Thus, where money is to be paid, it must be paid in the currency of the place named for payment. If the rates of interest in the two countries differ, that of the place appointed for payment is to be adopted (b). By the same law also, namely, that of the place of performance, is the mode of performance, the validity of the contract, and the nature of the discharge to be governed. Thus, if the performance consists of the delivery of goods or land, the mode of delivery or the form of conveyance must be that which the law of the place where the goods or land are, prescribes. "In every disposition or contract," said Lord Mansfield, "where the subject-matter relates locally to England, the law of England

(a) St. Conf., § 267.

(b) Wharton, § 506.

must have been intended to govern " (a); and so, generally, the law of the place of performance determines the nature and extent of the obligation (b). In *Cammell v. Sewell* (c) the general proposition was laid down that, " if personal property is disposed of in a manner binding according to the law of the country where it is, that disposition is binding everywhere."

Again, the discharge of a contract, if valid by the law of the place of performance, is valid everywhere: and conversely if it is not valid by that law, it cannot be pleaded as a discharge elsewhere. An obligation to be performed abroad was held not to be barred by a discharge under the English Bankruptcy Law (d).

In *Ellis v. McHenry* (e), the following propositions were laid down by Bovill, C. J.:—" 1st, that a debt or liability arising in any country may be discharged by the laws of that country, and that such a discharge, if it extinguishes the debt or liability and does not merely interfere with the remedies or course of procedure to enforce it, will be an effectual answer to the claim, not only in the Courts of that country, but in every other country; 2ndly, that the discharge of a debt or liability by the law of a country other than that in which the debt arises, does not relieve the debtor in any other country; 3rdly, that when the discharge is created by the Legislature or laws of a country which has paramount jurisdiction over another country in which the debt or liability arose, or by the Legislature or laws which govern the tribunal in which the question is to be decided, such a discharge may be effectual in both countries in the one case or proceedings before the tribunal in the other." In *Edwards v. Ronald* (f) an English certificate of bankruptcy was held to be a good answer to a debt arising in Calcutta and sued for there: so with regard to a debt contracted and sued for in Scotland. In *Armani v. Castrique* (g), Pollock, C. B., says,—“ A foreign

(a) *Warrender v. Warrender*, 9 Bligh., 89; *Cammell v. Sewell*, 29 L. J., Exch., 350.

(b) *Snaith v. Mingay*, 1 M. & S., 87; *De la Vega v. Vianna*, 1 B. & A., 284.

(c) 5 H. & N., 744, *per* Crompton, J.

(d) *Phillips v. Allan*, 8 B. & C., 477.

(e) L. R., 6 C. P., 233.

(f) 1 Knapp, P. C., 259.

(g) 13 M. & W., 443.

certificate is no answer to a demand in our Courts, but an English certificate is surely a discharge as against all the world in English Courts." On this principle it was held in *Ellis v. McHenry* (a) that the English Bankruptcy Law is binding in the colonies, and that an English composition-deed containing a covenant not to sue may be pleaded to an action on a Canadian debt in a Canadian Court: also that if an action on a contract made and to be performed abroad is brought in an English Court, an English composition-deed containing a covenant not to sue, is a good answer.

In *Bartlett v. Hodges* (b) the defendant pleaded a discharge in an insolvency-proceeding in the Supreme Court of Victoria. The plaintiff replied that the bill was drawn and accepted in England, and that the defendant was a resident in and subject of that country. This was held a good replication.

In *Smith v. Wegeulin* (c) it was decided that when the Government of a State contracts a loan in another country, the contract is governed by the law of the State whose Government contracts the loan, and not by the law of the country in which the contract is made; and an English Court has no jurisdiction to enforce the contracts of a foreign Government against the property of such Government in England.

When a contract of affreightment does not otherwise provide, as between the parties to the contract, the law of the country to which the ship belongs must be taken to be the law to which they have submitted themselves (d).

In *P. & O. Company v. Shand* (e) a passenger in an English ship from Southampton to Mauritius, where French law prevails, sued the shipowners for a loss of luggage on an alleged liability by French law, from which the shipowner was exempt by English law. The Judicial Committee, overruling the Mauritius Courts, held that the contract was governed by English law.

A party, who relies on a right or exemption by foreign law,

(a) L. R., 6 C. P., 233.

(b) 8 Jur., N. S., 52.

(c) L. R., 8 Eq., 198.

(d) *Lloyd v. Guibert*, L. R., 1 Q. B., 115.

(e) 11 Jur., N. S., 771.

must bring it clearly before the Court, otherwise the Court must proceed according to the *lex fori* (a).

For Savigny's rules for determining the seat of an obligation and the reasons upon which they are founded, reference may be made to the judgment in *D'Souza v. Coles* (b).

The *lex fori*, besides regulating all matters relating to the remedy, such as evidence and procedure, also determines when and how far the law of a foreign country is to be recognized (c). If the adoption of a foreign law would occasion prejudice to the rights of other States, or their citizens, or contravene a prohibitory enactment, the comity of nations would not require its adoption (d). This has been interpreted as applying to contracts "which are unjust or immoral, or the enforcement of which in a State would be injurious to the interest or the convenience of such State or its citizens." "Contracts," says Story, "which are in evasion or fraud of the laws of a country, or of the rights or duties of its subjects, contracts against good morals, or against religion, or against public rights, and contracts opposed to the national policy or national institutions, are deemed nullities in every country affected by such considerations, although they may be valid by the laws of the place where they are made" (e).

In *Hope v. Hope* (f) it was held that, if a part of a contract were inconsistent with the *lex fori*, the Court would not enforce it even as to another part which was not open to that objection and which alone remained to be performed. Contracts made in fraud of home revenue-laws are undoubtedly treated as illegal by home Courts, but in numerous cases the English Judges have refused to treat on the same footing contracts to evade or defraud the revenue-laws of another country. These decisions have, however, been universally condemned (g).

Another rule is, that contracts regarding immoveable property

(a) *Lloyd v. Guibert*, L. R., 1 Q. B., 129.

(b) 3 Mad. H. C., 415.

(c) *Langton v. Hughes*, 1 M. & S., 593.

(d) *Fenton v. Livingstone*, 3 Mac. H. L. C., 497.

(e) *Forbes v. Cochrane*, 2 B. & C., 448; Story Conf., § 244; 4 Mad. H. C., 14.

(f) 8 DeG. M. & G., 731.

(g) Wharton, § 485.

must be governed in every instance by the law of the place where the property is situated. "In every disposition or contract," said Lord Mansfield, "when the subject-matter relates locally to England, the law of England must govern and must have been intended to govern" (a). And, therefore, a contract about land, unattended by solemnities, imperative by the law of the country in which the land is, would be void, though no such solemnities are enjoined by the law of the country where the contract was made. Still more would such a contract, if *forbidden* by the *lex situs*, be void, though allowed by the *lex loci contractus*.

(2) No express provision is made in the Act as to its applicability to contracts entered into before 1st September, 1872; accordingly, the general principle of law will apply, that "a contract is always to be judged according to the positive law which subsists at the time when it is concluded" (b). "Statutes are not to be held to operate retrospectively unless they contain express words to that effect. Sometimes, no doubt, the Legislature finds it convenient to give a retrospective operation to an Act to a considerable extent, but then care is always taken to express that intention in clear and unambiguous language" (c).

This view of the law was upheld in *Omda Khanum v. Brojendro Coomar Roy Chowdry*, (d) the Court observing, that "the principle of the Civil law (*omnia constituta non preteritis calumniam faciunt sed futuris regulam imponunt*) as to new laws not having retrospective force has been transferred into the chief modern Codes. The Code Civil, Art. 2, runs thus:—'*La loi ne dispose que pour l'avenir, elle n'a point d'effet rétroactif*.' The Prussian Code enacts:—'New laws cannot be applied to acts and events that have previously occurred.' The Austrian Code provides:—'Laws have no retrospective effect; they have, therefore, no influence on previous acts or acquired rights.' And the

(a) *Warrender v. Warrender*, 9 Bligh, 89.

(b) Sav. P. I. L., 315.

(c) *Marsh v. Higgins*, 19 L. J., C. P., 297; *Phillips v. Eyre*, L. R., 4 Q. B., 225.

(d) 12 B. L. R., 458.

English cases of *Hughes v. Lumley* (a) and the *Mayor of Berwick v. Oswald* (b) seem to me to support the view that an Act regulates the future and not the past, unless it appears from the Act itself that the intention of the Legislature was otherwise." The same point was raised on appeal, but the Judges intimated that they were of opinion that the Indian Contract Act was not retrospective (c).

A contract, accordingly, entered into previously to the passing of the Act, even though it is not to be performed till after the passing of the Act, will not, it is submitted, be governed by its provisions, wherever the effect would be to take away any existing right, or to annex any incident to the contract not contemplated by the parties when the contract was made. In *Doolubdass Pettamberdass v. Ramlohl Thackoorseydass* (d) it was held that a contract of wager, not illegal at the time when it was made, was not affected by an Act subsequently passed, declaring that all such agreements should be null and void and that no suit should be allowed for recovering anything won on a wager, as there was nothing in the Act to indicate an intention on the part of the Legislature that the Act should be retrospective.]

The enactments mentioned in the schedule hereto are repealed to the extent specified in the third column thereof ; but nothing herein contained shall affect the provisions of any Statute, Act, or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, not inconsistent with the provisions of this Act (3).

[(3) This proviso has the effect of exempting from the operation of the Act all special enactments dealing with particular contracts, such for instance as Act XIII of 1859 (as to

(a) 4 E. & B., 358.

(b) 3 E. & B., 653.

(c) 12 B. L. R., 472.

(d) 5 M. I. A., 109.

breaches of contract by artificers and others in certain cases); Chapter XIX of the Penal Code as to criminal breaches of contract; Seamen's contracts under the Merchant Shipping Act, 1854, or Act I of 1859; contracts of marriage under the several Acts which have been from time to time or are now in force regulating that subject, such as Act XV of 1872, Act XXI of 1866, or Act III of 1872; contracts with common carriers under Act III of 1865, and with railways under Act XVIII of 1854; contracts with emigrants under Act VII of 1871; contracts with native laborers in the Madras Presidency to be performed without the Presidency, under Act V of 1866, (M.); contracts for labor under Act VI of 1865 [B.]; the provisions of Act VI of 1840 as to bills of exchange in cases governed by English law; the provisions of Chapter XXXIX of the Code of Civil Procedure as to summary procedure on bills of exchange; the provisions of Act IX of 1856 as to bills of lading; of Act XXXII of 1839 as to payment of interest; of Act XXVIII of 1855 as to usury. Nor again will the Act affect such customary rights as the right of pre-emption, wherever it exists; the English Law Merchant as to bills of exchange, promissory notes and bills of lading in the Presidency-towns, and the local customs which regulate these subjects in the Mofussil; matters also which do not come within the operation of Municipal law, such as those which come before Courts exercising Admiralty jurisdiction, are unaffected by the Act. The general Maritime law as administered in such Courts will therefore still govern questions of bottomry, salvage, &c.

Nor again will the Act over-ride the provisions of Hindu and Muhammadan law as to the circumstances under which alienations may legally take place or property otherwise be dealt with by way of contract, except when those provisions are in distinct contravention of the Act.

In the Presidency-towns Hindus and Muhammadans enjoyed, under several early enactments, the right of having their suits as to contract determined by native law. 21 Geo. III, c. 70, s. 17, in the case of Calcutta, and 37 Geo. III, c. 142, s. 12, in the case of Calcutta, Madras and Bombay, provide that all matters of contract and dealing between party and party shall

be determined, when the parties are Muhammadans, by the laws and usages of the Muhammadans; when the parties are Gentoos by the laws and usages of the Gentoos, or by the law which would have been applied in a native Court: and when one of the parties is a Muhammadan or Gento, by the law of the defendant. These Statutes were no doubt intended merely to preserve the special usages and customs of the two races, and their provisions have never been applied in the High Courts as excluding the operation of such substantive rules as may from time to time be enacted by the Legislature on any special subject. As to 21 Geo. III, c. 70, Couch, C. J., ruled that it was applicable to the High Court, not by virtue of the Statute itself, but by virtue of the Charter, that the Charter was subject to alteration by the Governor-General in Council, that having ceased to have any operation as an Act, it was unnecessary to repeal it expressly by the Contract Act and that consequently the Act is applicable to Hindus resident in Calcutta. The words "not inconsistent with the provisions of this Act" apply to "any usage or custom of trade" or "any incident of any contract" (a).]

2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

(a.)—When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:

(b.)—When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted (1). A proposal, when accepted, becomes a promise:

[(1) Till the acceptance of the offer is signified to the proposer,

(a) *Madhub Chunder Poramanick v. Rajcoomar Doss*, 14 B. L. R., 76.

there is no relation established between the parties; there is a mere proposal binding on neither party. The acceptance of the proposal, however, need not always be expressed in words. See Sections 8 and 9.

Sometimes proposals are made, not to a definite person, but to any one who likes to accept them; and then, directly any one accepts them, they become promises. The Time Tables of a Railway are a promise that trains will start as advertised, offered to all persons who choose to apply in the regular manner to be carried by them (a). An advertisement, offering a reward for the discovery of a lost article, or of the perpetrators of a crime, is a promise to pay the reward to whoever discovers the article or the person in question. But if the act required is done without the proposal having been previously communicated to the person who does it, there is no contract. An offer uncommunicated to the other party has no effect. Thus in a case where the plaintiff, never having heard of the advertisement, gave information about a murder and subsequently demanded the reward, it was said, "To the existence of a contract there must be mutual assent, or, in another form, offer and consent to the offer. The motive inducing consent may be immaterial, but the consent is vital. Without that there is no contract. How then can there be consent or assent to that of which the party has never heard?" (b).

At an auction-sale the acceptance is signified by the falling of the hammer, the offer being made by the bidder upon the invitation of the auctioneer (See note to Section 122).

An advertisement for tenders stands on the same footing: the advertiser, accordingly, being the person to whom the proposal is made, is not bound to accept the highest tender (c). The advertizing by an auctioneer of an intended sale is a mere declaration, and does not amount to a contract with any one who might act on it; nor to a warranty that all the articles advertized would be put up for sale (d).]

(a) *Williams v. Carwardine*, 4 B. & A., 621; *Denton v. Great Northern Railway Company*, 25 L. J., Q. B., 129, at p. 134.

(b) *Fitch v. Snedaker*, Langd. on Cont., 110.

(c) *Spencer v. Harding*, L. R., 5 C. P., 561.

(d) *Harris v. Nickerson*, L. R., 8 Q. B., 286.

(c.)—The person making the proposal is called the “Promisor” and “Promisee.” ‘promisor,’ and the person accepting the proposal is called the ‘promisee.’

(d.)—When, at the desire of the promisor, the promisee or any other person has “Consideration.” done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise (2):

[(2) A consideration for a promise exists when, at the promisor’s request, the promisee has either suffered some inconvenience or has done something beneficial to the promisor. “It is defined to be any act of the plaintiff from which the defendant or a stranger derives a benefit or advantage, or any labour, detriment, or inconvenience sustained by the plaintiff, however small the detriment or inconvenience may be, if such act is performed or inconvenience suffered by the plaintiff with the consent, express or implied, of the defendant, or, in the language of pleading, at the special instance and request of the defendant” (a). Thus, the fact of the plaintiff, at the defendant’s request, supplying a third person with goods, is consideration for a guarantee given by the defendant to the plaintiff (b).

It also exists when, instead of something done or suffered previously to the making of the promise, there is a promise on the promisee’s part to do or suffer something coming within the category of consideration. Further, the Act says that the doing or the suffering on the one hand, and the promise on the other, may proceed from a person other than the promisee himself. According to English law the consideration must “move from the plaintiff” in an action on a promise; and if, therefore, the thing, which forms the matter for the consideration, is done or suffered by a third party, it must be on the procurement of the promisee (c). These words would have to be added to the present

(a) *Laythoarp v. Bryant*, 3 Scott, 238, at p. 250.

(b) *Morrell v. Cowan*, L. R., 6 Ch. D., 166.

(c) *Price v. Easton*, 4 B. & A., 433.

section in order to bring it into exact accordance with English law. In any case the definition of "consideration" given in the section appears defective, inasmuch as it fails to establish any connection between the promisor's promise on the one hand, and the act, abstinence or promise of the promisee on the other. The mere fact that somebody has done something at the promisor's request cannot have any effect on his promise to some one else till it is in some way connected with it and shown to have had something to do in producing it. The defect would be remedied by substituting some such words as these for the last clause of the section, "and such act, abstinence or promise is either stated by the terms of the contract or can be shown otherwise to have been wholly or partially the cause for the promisor's promise, it is called the consideration for the promise." Consideration being thus extended in its meaning comes nearer to the notion of *causa* as understood in the Roman law. By *causa* is meant that which determines a man in entering on some legal engagement. In a contract it is generally the act or promise of the other party; in a gift it consists in pure liberality. An engagement to pay A on account of services rendered to A's father has a good *causa*, but is without consideration. See note (3), Section 25.

The consideration must be of some value, but the adequacy of the value is immaterial. Therefore a promise founded "on motives of generosity, prudence, and natural duty," is without consideration; as a promise to pay for past services rendered to a woman before her marriage with the promisor, or to a son whom the promisor is not bound to support, is without consideration (a); but such a promise might, apparently, be enforceable under Section 25, cl. (2). See note thereto.

"Motive," says Patteson, J., "is not the same thing with consideration. Consideration means something, which is of some value in the eye of the law, moving from the plaintiff: it may be some benefit to the plaintiff or some detriment to the defendant, but at all events it must be moving from the plaintiff.

(a) *Eastwood v. Kenyon*, 11 A. & E., 488; *Jennings v. Brown*, 9 M. & W., 496.

Now that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff: it moves from the testator; therefore, legally speaking, it forms no part of the consideration" (a). On this principle it has been held that contracts made between two persons for the benefit of a third cannot be enforced by the latter. Where the fathers of a man and his wife agreed that a certain sum should be paid by one of them to the husband, it was held that the husband could not sue upon the agreement because the consideration did not move from him (b). The present section appears to have a wider scope, and to enable A to enforce against B a promise, the consideration of which is something done or promised by C, provided it was done at the desire of B.

A promise to pay a man, for doing that which he is already legally bound to do, is without consideration, as for instance, a promise to compensate a witness for his loss of time in attending in Court (c); or a promise made in the course of a voyage to give sailors bound for the voyage extra wages in consideration of their continuing to serve (d); or a promise made in consideration of the payment of a debt which the promisor was already bound to pay (e).

Again the relinquishment of a void promise (f), or the discharge of a person from illegal imprisonment, is no consideration (g); nor is the payment of a judgment debt, it being no more than the promisee could be compelled to do (h).

A pledge given by the acceptor of bills of exchange, which are still running, on the occasion of the drawers becoming insolvent, is given without consideration, and therefore cannot be enforced (i).

(a) *Thomas v. Thomas*, 2 Q. B., 851.

(b) *Tweddle v. Atkinson*, 30 L. J., Q. B., 265; *Barber v. Fox*, 2 Saund. 134.

(c) *Collins v. Godefroy*, 1 B. & Ad., 950.

(d) *Stilk v. Myrick*, 2 Camp., 317.

(e) *Jones v. Waite*, 5 Bing. (N. C.), 341.

(f) *Barnard v. Simons*, Langd. Cont., 187.

(g) *Atkinson v. Setttee*, Langd. Cont., 189.

(h) *Dixon v. Adams*, Langd. Cont., 184.

(i) *Manna Lal v. Bank of Bengal*, I. L. R., 1 All., 309.

A promise given by the obligor of a bond not to expose the conduct of the obligee in a matter of adultery committed by the latter with the obligor's wife, is no consideration for an agreement not to sue on the bond, and therefore such an agreement constitutes no defence to an action on it (a).

On the other hand, the relinquishment of a groundless action forms a good consideration if the claim is honestly made with a belief in its reality. The transaction then amounts to a compromise, even although the other party knew that the claim was unfounded (b).

A promise to conduct proceedings in bankruptcy so as to injure as little as possible the debtor's credit is not a good consideration to support a contract, but a promise not to apply for costs under the 85th section of the Bankruptcy Act, 1849, is a sufficient consideration to support a contract (c).

It is no objection that the act forming the consideration is one which enures wholly to the benefit of some third person, or that it is one which a third person could have compelled the promisee to do. Thus, the relinquishment or forbearance of a claim against a third person is a valid consideration (d). To a declaration stating that, in consideration that the plaintiff would deliver a certain cargo to the defendant, the defendant promised to unload it, it was pleaded that, at the time of making the said promise, the plaintiff was under a contract with some third person to deliver the said cargo to his order, and that it was under such contract that he had made delivery, and that otherwise there was no consideration for the defendant's promise; the plea was held bad; "If a person chooses to promise to pay a sum of money in order to induce another to perform that which he has already contracted with a third person to do, I confess I cannot see why such a promise should not be binding" (e).

(a) *Brown v. Brine*, L. R., 1 Ex. D., 5.

(b) *Haigh v. Brooks*, 10 A. & E., 309; *Cook v. Wright*, 1 B. & S., 559; *Wilby v. Elgee*, L. R., 10 C. P., 497.

(c) *Bracewell v. Williams*, L. R., 2 C. P., 196.

(d) *Callisher v. Bischoffsheim*, L. R., 5 Q. B., 449.

(e) *Scotson v. Pegg*, 6 H. & N., 295, *per* Wilde, B.; *Shadwell v. Shadwell*, 30 L. J., C. P., 145.

The Court leaves the adequacy of the consideration to the estimation of the parties themselves. A promise made in consideration of the plaintiff allowing the defendant to weigh certain boilers was held valid. "We need not enquire," it was observed by the Court, "what benefit he expected to derive. The plaintiff might have given or refused leave" (a).

A nominal consideration being expressed in a deed does not prevent the admission of evidence *aliunde* of the real consideration, provided such real consideration is not inconsistent with the deed (b).

The matter done or suffered must be something beyond the mere fact of accepting the proposal, because, till the proposal has been accepted it has not become a promise, and there is consequently no promisee.

The first kind of consideration mentioned in this note is called by English lawyers an executed consideration, and must in their language be moved by an antecedent request. The promise and the request need not be concurrent. Thus, if A request B to pay money for him, a subsequent promise to repay it would be a promise with a consideration (c). So, where defendant promised to pay plaintiff £20. in consideration that plaintiff *had*, at the instance of defendant, taken defendant's cousin to wife, this was deemed good consideration, as it would clearly be under the present definition.

The acceptance of B's tender for the supply for 12 months of goods at specified rates to A "in such quantities as A may order from time to time" is sufficient consideration to enable A to enforce the contract against B, though A was under no obligation to order any goods (d).

The service done must not, of course, have been done as a gratuitous favour (e). The antecedent request which the common law requires, need not, however, have been made in fact, for by a fiction it is implied from the mere acceptance of the executed

(a) *Bainbridge v. Firmstone*, 8 A. & E., 743.

(b) *In re British and Foreign Cork Company*, *Leifchild's case*, L. R., 1 Eq., 231.

(c) *Lampleigh v. Braithwaite*, 1 Smith's L. C., 135.

(d) *Great Northern Railway Company v. Witham*, L. R., 9 C. P., 16.

(e) *Jewry v. Busk*, 5 Taunt., 302.

consideration. This fiction has no place in the Act, and the cases, for which it provided, are governed by Section 70. See note to that section.

The last kind of consideration mentioned in this section is called in English law "an executory consideration," and consists of a promise to do or suffer something, by which any loss or inconvenience may accrue to the party by whom it is made, or any benefit to the person to whom it is made or to any third person. Thus in the common case of a surety, if the creditor's promise, which induces a person to guarantee the debt, is one, from the performance of which that person can derive a benefit or the creditor may suffer inconvenience, then such promise forms a good consideration for the surety's promise (a).

It is the established practice of the Courts in India, in cases of contract, to require satisfactory proof that consideration has been actually received according to the terms of the contract; and a contract under seal does not of itself, in India, import that there was a sufficient consideration for the agreement (b). By Hindu law a promissory note does not import consideration, and therefore where it was proved that the defendant actually received only Rs. 700 that sum was all the plaintiff was allowed to recover (c).]

(e.)—Every promise and every set of promises, forming the consideration for each other, is an agreement:

"Agreement."

(f.)—Promises which form the consideration or part of the consideration for each other, are called reciprocal promises:

"Reciprocal promises."

(g.)—An agreement not enforceable by law is said to be void:

"Void agreement."

(h.)—An agreement enforceable by law is a contract:

"Contract."

(a) *Morley v. Boothby*, 3 Bing., 107.

(b) *Raja Sahib Prahlad Sen v. Budhu Sen*, 2 B. L. R., P. C., 111.

(c) *Ramlal Mookerjee v. Haran Chandra Dhar*, 3 B. L. R., O. C., 130.

(i.)—An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract (3):

“(3) The principal classes of contracts, voidable *ab initio*, are set forth in Sections 19 and 39. Sections 53 and 54 give specimens of contracts which become voidable.]

(j.)—A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable (4).

[(4) The distinction between a void and a voidable transaction is important. That which is void never has any legal existence and cannot, therefore, be confirmed: on the other hand, that which is voidable is valid as long as it is not impeached by the party who has it in his power to avoid it (a).

The wording of the section would be rendered more exact by the addition, after the words “enforceable by law,” of the words “by either or any of the parties thereto.”]

CHAPTER I.

OF THE COMMUNICATION, ACCEPTANCE, AND REVOCATION OF PROPOSALS.

3. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

(a) *Chesterfield v. Janssen*, 1 W. & T. L. C., 5th Edn., 592; *Oakes v. Turquand*, L. R., 2 H. L., 375.

[Section 8 gives instances of how a proposal may be accepted otherwise than in words, *viz.*, by performance of its conditions, or acceptance of the consideration with which it is offered : Section 6 gives instances of how a proposal may be revoked otherwise than by words.]

4. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete, as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor ;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete, as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations.

(a) A proposes, by letter, to sell a house to B at a certain price.

The communication of the proposal is complete when B receives the letter.

(b) B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete,

as against A, when the letter is posted ;

as against B, when the letter is received by A.

(c) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is despatched, and as against A when it reaches him.

[The same rules, as apply to the communication and revocation of proposals, govern the rescission of voidable contracts. See Section 66.]

5. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards (1).

Revocation of proposals and acceptances.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards (2).

Illustration.

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post.

A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

[(1) There appears to be some doubt under the English law whether a proposer who has posted his letter of proposal can retract it by posting another before the first letter reaches its destination. It is clear under this section that he can recall his proposal at any time, before the letter of acceptance has left the hands of the acceptor. The revocation must, of course, be made in such a way as to come to the notice of the promisee: for instance, if A proposes something to B by letter, the section does not mean that he can at any moment before B posts his letter of acceptance write another revoking his proposal; his revocation, whether by word of mouth, letter, or telegram, must have reached B before B's acceptance is posted.

This section must be read along with Section 7. It is dealing merely with the question of the moment at which the communication of a proposal, acceptance or revocation is complete, not with the matter of which it must consist, or the mode in which the communication must be made. It will be seen from Section 7 that where the proposal points out a particular mode of acceptance, the agreement is not complete till there has been an acceptance in that mode.

The question as to the moment at which the proposer is bound by an acceptance is one on which the English cases have been in direct conflict. On the one hand there was an expression of opinion in a recent case (*a*) that a notice of acceptance sent, but not received by the proposer, is not equivalent to an acceptance, so as to constitute a contract between the parties. It was on that occasion remarked that there is no difference between accepting by post and by messenger. Mere delivery, whether to the Post-office, or to the messenger, does not affect the other party: and if the post or messenger fails to transmit the letter to him, or if it is retracted by another letter arriving earlier or simultaneously, in either case the acceptance, which a contract requires, has not taken place, and the contract is therefore incomplete.

On the other hand, the contrary view of the law has been taken in still more recent cases. In *Harris'* case (*b*) the point was distinctly raised, and it was decided that the contract was binding when the letter of acceptance was put into the post. The Lords Justices disapproved of the ruling in the Exchequer case, and observed that it was irreconcilable with the decisions in *Adams v. Lindzell* (*c*) and *Dunlop v. Higgins* (*d*). The question may now, therefore, be considered as settled in England. Under the present section it is clear that, in the case of a posted letter, the acceptance is complete as against the proposer when the letter is posted: it is complete as against the acceptor, *i. e.*, ceases to be revocable by him, when it reaches the proposer.

(2) If the letter of acceptance and a letter of revocation posted subsequently, arrive at the same time, they must be read together, and it is obvious that no contract arises (*e*).

Sometimes the proposer expressly gives the other party a specified time within which acceptance is to be made: but he does not by doing so lose his power of withdrawing at any time before the acceptance becomes complete as against himself. An offer, for instance, to sell with a promise to keep it open till a certain day is *nudum pactum*, and can at any time before acceptance

(*a*) *British and American Telegraph Company v. Colson*, L. R., 6 Ex., 108. See also *In re Imperial Land Company of Marseilles*, Wall's case, L. R., 15 Eq., 18.

(*b*) L. R., 7 Ch., 587.

(*c*) 1 B. & Ald., 681.*

(*d*) 1 H. L. C., 381.

(*e*) *Dunmore v. Alexander*, 9 Sh. & Dun., 190.

be recalled. The principle on which this rule proceeds is that the acceptor is bound to nothing till acceptance, and therefore the proposer ought not to be. This was decided in *Cooke v. Oxley* (a), and, though much questioned, has since been followed. Thus, where defendant offered to plaintiff certain wool for sale with three days' grace to make up his mind, and within three days plaintiff went to accept the offer, when he was told that the wool was sold to another, it was held there was no contract, because when the plaintiff signified his acceptance the defendant did not agree (b).]

Revocation
how made.

6. A proposal is revoked—

- (1) by the communication of notice of revocation by the proposer to the other party;
- (2) by the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;

[Neither proposal nor revocation of proposal is effectual until communicated to the offeree. "In all engagements *inter absentes*, when the negotiations are carried on by letters or messages, an offer by one party, until it is made known to the other, is but an intention not expressed, *propositum in mente retentum*. If the messenger or letter can be overtaken before it arrives at its destination, it may be revoked; but if the revocation does not arrive until after the offer is received *and accepted*, and especially not until it has been acted upon, then it is too late. For the revocation is but a simple act of the will, a *propositum*, not *res gesta*, an act done, until after it is known, and of course can have no more effect than an intention not expressed, but confined within the breast of the party" (c).

(a) 3 T. R., 653.

(b) *Head v. Diggon*, 3 M. & R., 97; *Dickinson v. Dodds*, 2 Ch. D., 463.

(c) *The Polo Alto*; Langd. Cont., 51.

An express retraction is not however necessary, and it is sufficient if it has come to the knowledge of the offeree that the offeror has done something which makes the performance of his offer impossible; for instance, if a person has made an offer to sell, and before acceptance by the offeree it becomes known to him that the offeror has sold the same thing to some other person (*a*).

It follows from the decision in *Cooke v. Oxley*, cited in the last note, that if the proposal is made at a personal interview and not accepted before the parties separate, it is deemed to be revoked and no subsequent acceptance will avail. In such cases the reasonable time generally expires on the separation of the parties.

If a period is specified within which acceptance must be made, the proposal obviously expires with that period. When a proposer specifies no period for acceptance, he is presumed to have intended acceptance to be made within a reasonable period; what this reasonable period in each instance is, the Court must decide from the facts of the case. In *Ramsgate Hotel Company v. Goldsmid* (*b*), there was an application for shares in June and an acceptance of the offer in November. This was held to be an unreasonable period.

Where defendant by letter offered to sell goods to plaintiff "receiving your answer in course of Post," and owing to misdirection the letter did not reach plaintiff till two days later than it should have arrived, and plaintiff's reply, though sent "in course of Post," was, accordingly, two days late, it was held that plaintiff had a right to insist upon the fulfilment of the contract (*c*). The point of the decision would seem to be that the plaintiff *did* accept "in course of Post," and that the defendant's offer was deemed to be made when it reached the plaintiff.]

(3) by the failure of the acceptor to fulfil a condition precedent to acceptance; or

[This provision appears to correspond to Section 8, of which it is the converse. If A, for instance, writes to B, proposing that

(*a*) *Dickenson v. Dodds*, 2 Ch. D., 463.

(*b*) L. R., 1 Ex., 109.

(*c*) *Adams v. Lindsell*, 1 B. & Ald., 681.

he shall immediately withdraw an advertisement, or suspend legal proceedings, and that, thereupon, certain terms shall be carried out; if B continues to advertize, or to go on with the proceedings, the proposal is revoked.]

- (4) by the death or insanity of the proposer, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance.

[According to English law, if the proposer dies or becomes insane before his offer is received and accepted, the offer is then a nullity, though accepted before the death is known. As was said in *Thomson v. James* (a), "Death or insanity may prevent the completion of the contract as effectually as the most complete revocation; but they are not properly revocations of the offer. They are not acts of the will of the offerer, and their effect does not rest upon a supposed change of purpose. They interrupt the completion of the contract,—that is, the making of the contract,—because a contract cannot be made directly with a dead man or a lunatic. The contract is not made until the offer is accepted; and if the person with whom you merely intend to contract dies or becomes insane before you have contracted with him, you can no longer contract directly with him. You cannot, by adhibiting your acceptance to an offer, and addressing it to a dead man or a lunatic, make it binding on him, whether his death or insanity be or be not known to you." Accordingly, a person having authorized a tradesman to supply his family with goods during his absence, and having died while absent, the tradesman was held to have no claim against his representative for goods supplied after his death (b). The same principle is stated by Pothier with this proviso, that if the person to whom the offer is made, in ignorance of the proposer's death or of any other circumstance preventing the conclusion of the bargain, incurs any loss or expense in the furtherance of the proposed object, he will from considerations of equity be entitled to compel the proposer's heirs to execute the contract.

(a) 18 Dunlop, 1; Landg. Cont., 128.

(b) *Blades v. Free*, 9 B. & C., 167. See also *Campanari v. Woodburn*, 15 C. B., 400.

There is no contract, but an obligation to indemnify has arisen out of the circumstances (a). This principle seems to have been adopted in the Act.

Of course the proposal is revoked by the death of the person to whom it is made before acceptance, and it cannot be accepted by his representatives (b).]

Acceptance must be absolute. 7. In order to convert a proposal into a promise, the acceptance must—

- (1) be absolute and unqualified (1) ;
- (2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise ; but, if he fails to do so, he accepts the acceptance (2).

[(1) There must be an acceptance, and, therefore, the person making the offer cannot, by stating that, if he receives no answer, he will assume that his offer is accepted, throw upon the other party the burden of notifying his refusal or being bound by his silence (c).

Nice questions sometimes arise as to whether there has been an acceptance or not. The language may be such as to convey a "grumbling assent," and to express a wish that the proposer would agree to other terms ; but the point to look to is whether, taking the language and conduct of the parties together, the one did intend, however reluctantly, to accept the offer of the other (d).

(a) *Traite du Contract de Vente*, No. 32.

(b) *Werner v. Humphreys*, 2 M. & G., 853 ; *Boulton v. Jones*, 27 L. J., Ex., 117.

(c) *Felthouse v. Bindley*, 31 L. J., C. P., 204.

(d) *Joyce v. Swann*, 17 C. B., N. S., 84.

If the person who receives a letter containing the terms of a proposed agreement, writes an answer reciting those terms, declaring his acceptance of them, he cannot, in any way, vary the effect of them without distinctly calling the attention of the party making the offer to the fact of his desire to do so. The mere addition of words which, *primâ facie*, do not import a variation, will not be sufficient to change the conditions of the agreement (a).

In *Levy v. Green* (b) the question was much discussed whether, where goods not ordered are sent along with goods ordered in one parcel and with one invoice, there is even a promise to pay for the goods ordered, inasmuch as it may be contended that there has not been an unqualified acceptance. The Court was equally divided. This difficulty is partially provided for by Section 119.

The acceptance must, too, be made by the person to whom the offer was made. Thus, when A ordered goods of B, with whom he had been in the habit of dealing, and C, who had bought B's good-will, supplied the goods, without giving A notice of the change, it was held that there was no contract between A and C, inasmuch as A had never intended to deal with C, but with B (c).

The least variation between the terms of the proposal and those of the acceptance will prevent the acceptance from converting the proposal into a promise. A qualified acceptance is, in fact, a new proposal. Thus, when A offered to take B's house, with possession from July 25th, and B accepted, offering possession from August 1st (d); or when A offered to buy B's horse on B's giving a warranty of the horse being quiet in harness, and B accepted, giving a warranty to the effect that the horse was quiet in double harness (e); in neither case was there held to be

(a) *English and Foreign Credit Co. v. Arduin*, L. R., 5 H. L., 64—see Lord Westbury's remarks at p. 79, and his judgment in *Chinnoek v. Marchioness of Ely*, 4 DeG. J. & S., 638.

(b) 8 E. & B., 575.

(c) *Boulton v. Jones*, 27 L. J., Ex., 117.

(d) *Routledge v. Grant*, 4 Bing., 654.

(e) *Jordan v. Norton*, 4 M. & W., 155. See also *Appleby v. Johnson*, L. R., 9 C. P., 158; *Crossley v. Maycock*, L. R., 18 Eq., 180.

an acceptance. For an instance of negotiations nearly complete, but falling short of an actual contract, see *Stanley v. Dowdeswell* (a).

As to an acceptance of shares sufficient to bind the acceptor as a shareholder, see *In re Leeds Banking Company*, Addinell's case (b).

As soon as the negotiations for a contract are complete and its terms agreed upon, there is none the less a binding contract, because the parties intend to reduce the terms into a formal writing. "If an agreement contain all the terms, the sending of it as instructions to a person to prepare a proper agreement will not be deemed an intention to extend the agreement, but merely to reduce it to technical language, and, therefore, it will, if in itself sufficient, be binding" (c): but this supposed general rule has been much shaken by the decision in the House of Lords of the case of *Ridgway v. Wharton* (d), where it was held that "the sending of the agreement to a solicitor to reduce it into form is rather evidence that the parties do not intend to bind themselves until it is reduced into form." In *Ridgway v. Wharton*, Lord Cranworth said: "I protest against its being supposed, because persons wish to have a formal agreement drawn up, that therefore they cannot be bound by a previous agreement, if it is clear that such an agreement has been made; but the circumstance that the parties do intend a subsequent agreement to be made, is strong evidence to show that they did not intend the previous negotiations to amount to an agreement." Lord St. Leonards dissented, holding that there was a concluded agreement, and that the sending it to a solicitor, who could not alter a single one of the terms, had no effect upon it.

The non-completion of a formality can only afford ground for an inference as to the intention of the parties, when the formality is one selected by themselves and not imposed upon them by law. Where, as in the case of a sale of land, it is necessary that certain

(a) 10 C. P., 102.

(b) L. R., 1 Eq., 225; *Jackson v. Tarquand*, L. R., 4 H. L., 305; *In re United Ports and General Insurance*, Wynne's case, L. R., 8 Ch., 1002; *Beck's case*, L. R., 9 Ch., 392.

(c) *Fowle v. Freeman*, 9 Ves. Jun., 351.

(d) 6 H. L. C., 268; Sugd., V. & P., 141.

formal steps should be taken in order that an interest should pass, no inference against a concluded agreement can be drawn from the non-completion of those forms (a).

The reasonable rule seems to be that the intention to reduce the terms into a formal writing is some evidence that the parties do not consider the contract concluded; and several cases seem to have gone upon this principle: thus, where two brokers agreed upon the terms of a contract of sale, and the writing which passed between them concluded with the words "contract in due course," it was held that these words did not import that there should be no contract until a formal contract was drawn up and delivered, but only an intention to set out the terms more fully for further security; and that, therefore, the parties were bound notwithstanding this intention (b). It seems unreasonable to conclude from the mere fact that parties choose to have the terms reduced into a formal shape, that they intended not to consider themselves bound by such terms. If, however, the terms are not settled there is clearly no agreement; for an agreement to enter into an agreement upon conditions to be afterwards settled is a contradiction in terms (c). A person, having received an offer to sell an estate, answered that he accepted the offer subject to the terms of a contract being arranged between his solicitor and the seller: it was held that there was no contract (d). So, again, where by a written agreement the defendant agreed with the plaintiff to take a lease of a house for a certain term at a certain rent "subject to the preparation and approval of a formal contract," and no other contract was ever entered into between the parties, it was held that there was no final agreement of which specific performance could be enforced against the defendant (e).

The terms of a contract of insurance are finally settled in the slip, and, therefore, as soon as it is signed, there is a com-

(a) *Brogden v. Metropolitan Railway Co.*, 2 App. Cases, 666.

(b) *Heyworth v. Knight*, 33 L. J., C. P., 298; *Rossiter v. Miller*, 5 Ch. D., 648; *Venkatachellamasami Chettiar v. Kristnasawmy Iyer*, 8 Mad. H. C., 1.

(c) *Honeyman v. Marryatt*, 6 H. L. C., 112.

(d) *Wood v. Midgely*, 5 De G. M. & G., 41.

(e) *Winn v. Bull*, 7 Ch. D., 29.

plete contract between the parties, although from the want of the statutory requisites, viz., the stamp, it is formally incomplete. The formal requisites of a deed in English law are sealing and delivery, the usual form of words to express delivery being, "I deliver this as my act and deed." Although there is no actual delivery of the instrument to the party interested under it, such words suffice as expressive of the intention of the maker. "Where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party (a), and nothing to show that he did not intend it to operate immediately, it is a valid and effectual deed, and the delivery to the party who is to take by it, or to any person for his use, is not essential" (b). Thus in *Xenos v. Wickham* (c) a policy of insurance was held to be completely executed, though it had been retained by the insurers, the evidence showing that that course was customarily adopted for the convenience of the assured. Where the maker of an instrument under seal expresses his intention that it shall not be immediately operative, the instrument is called escrow. Such conditional delivery may be evidenced either by words spoken at the time of execution or may be inferred from circumstances attending it (d).

(2) This provision throws upon the proposer, whose proposal has been accepted, but not in the manner prescribed, the burthen of insisting that the acceptance shall be in that manner. The words "manner in which it is to be accepted" mean, it is obvious from the context, "manner in which the acceptance is to be expressed": this provision is not, of course, intended to authorize a qualified acceptance, which the first sub-section distinctly disallows. The acceptance must, in every case, be absolute and unconditional: and if it is made in a different manner from that specified by the proposal, e. g., orally, instead of in writing, or on plain, instead of stamped, paper, the proposer has the right within a reasonable time to insist that the acceptance shall be in the manner prescribed in the proposal and no other.

(a) *Cory v. Patton*, L. R., 7 Q. B., 304.

(b) *Doe v. Knight*, 5 B. & C., at p. 692.

(c) L. R., 2 H. L., 296.

(d) *Leake on Cont.*, 78.

If he says nothing, he is deemed to have acquiesced in the manner of the acceptance and is bound by it.

In a recent case a mistake was made in telegraphing the terms of the offer. The offeree accepted what he thought was the intended proposal, but, as there was no consent to the same terms, no contract was created (a).

The result of the section seems to be that, if at the time when the final act indicative of acceptance is done, no notice of revocation of the proposal is or has been communicated to the party accepting it, then such act makes the proposal irrevocable, provided it be done within a reasonable time or within the prescribed time. The fact of a time being prescribed merely substitutes such time for a reasonable time, and in other respects leaves the parties in the same relative position.]

8. Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Acceptance by performing conditions, or receiving consideration.

[This section contains two instances of the communication of an acceptance, made, not by word of mouth, but by an act of the accepting party, as provided in Section 3. The acceptor, by performing the conditions proposed, or accepting the consideration offered, impliedly agrees to the bargain. It is not, however, every representation made on the one hand and acted upon on the other that creates an obligation. There must be an irrevocable expression of will, a proposal stating a condition on the one hand and an acceptance by performance on the other (b). In a case where the defendant, in answer to an advertisement, sent in a tender to supply the goods required by the plaintiffs "in such quantities as the Company's Store-keeper might order from time to time" and the Company accepted the tender, it was objected that there was no consideration for the defendant's pro-

(a) *Henkel v. Pape*, L. R., 6 Ex., 7; *Appleby v. Johnson*, L. R., 9 C. P., 158.

(b) *Maunsell v. Hedges*, 4 H. L. C., 1039; *Hammersley v. DeBiel*, 12 Cl. & Fin., 45.

mise, because the plaintiffs were not bound to give an order. In overruling this objection, Brett, J., said: "Many contracts are obnoxious to the same complaint. If I say to another, 'If you will go to York I will give you £100,' that is in a certain sense a unilateral contract. He has not promised to go to York. But, if he goes, it cannot be doubted that he will be entitled to receive the £100. His going to York at my request is a sufficient consideration for my promise. So, if one says to another, 'If you will give me an order for iron, or other goods, I will supply it at the given price;' if the order is given, there is a complete contract which the seller is bound to perform" (a). In *Dugdale v. Lovering* (b), the plaintiffs offered to give up certain goods on being indemnified; the defendants, without saying anything, took the goods: it was held that there was an implied promise to indemnify.]

9. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

[It is comparatively seldom, and only in the more serious classes of transactions, that the whole of any promise or acceptance is actually expressed. Sometimes nothing at all is said; sometimes only the leading terms of the contract are mentioned and the rest left to be understood from the conduct of the parties and the nature of the transaction. If a man enters a shop and consumes some article exposed there for sale, there are reciprocal promises between him and the owner of the shop, though not a word may be spoken on either side; the promise on the shopman's side being to allow the customer to have the article at the price notified, or at a reasonable price; the promise on the customer's being to pay the price. So, if a man takes a place in a stage-carriage, there arises on the one hand a promise on the part of the owners of the carriage to carry him

(a) *Gt. Northern R. Company v. Witham*, L. R., 9 C. P., at p. 19.

(b) L. R., 10 C. P., 196.

in a certain manner and at a certain price, and, on the other hand, a promise by him to pay the price. So again, "where a relation exists between two parties, which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him" (a). Thus it was held that an action may be maintained against the executors of an inn-keeper on his implied promise to keep safely and without diminution the goods of his guest. In these cases the whole promise is implied. Generally, however, something is written or said, and the contract is so far express; but something more is left to be implied. "Merchants and traders," says Lord Campbell with reference to documents evidencing agreements (b), "with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily, desire to write little, and leave unwritten what they take for granted in every contract. In spite of the lamentations of Judges, they will continue to do so; and in a vast majority of cases, of which Courts of Law hear nothing, they do so without loss or inconvenience; and, upon the whole, they find this mode of dealing advantageous even at the risk of occasional litigation."

What the implied contract is, must be, in each case, collected from the surrounding circumstances: generally there is some usage or custom which leaves no doubt as to the intentions of the parties; and when this is not the case, the promise to be implied may generally be gathered from a consideration of what it is probable, under the circumstances, that the party should promise.

Thus, where one person covenants to perform a service in consideration of payments to be made by another, there is an implied covenant on the part of the other person to employ and allow the payment to be earned (c). So from the fact that the purchase-

(a) *Morgan v. Ravey*, 6 H. & N., 265, *per Cur*, at p. 276.

(b) *Humfrey v. Dale*, 7 E. & B., 266; see also *Morrell v. Cowan*, 6 Ch. D., 166; *Fleet v. Murton*, L. R., 7 Q. B., 126; *Myers v. Sarl*, 30 L. J., Q. B., 9.

(c) *Churchward v. Queen*, L. R., 1 Q. B., 173.

money is partly to be ascertained from future payments, there may be implied a covenant to carry on the business (a).

The implied contract, however, must be one which arises fairly and naturally from the facts of the case, irrespectively of what may have been the belief or intention of one of the parties. For an instance in which the Court refused to allow an implied contract to be imported into a transaction, see *Thorn v. The Mayor of London* (b).

These cases, in which there is an actual promise and acceptance, though not expressed in words, must be distinguished from another class of implied contracts which is to be found in English law, those, namely, in which provision is made for certain rights and the duties corresponding to those rights, through the fiction of an implied contract. The circumstances of the case being such as to involve an unjust pecuniary inequality between the parties, the law, instead of enacting simply that this inequality shall be adjusted, assumes that the one party has promised the other to adjust it. These cases are for the most part, (1) those in which the plaintiff has paid money for the defendant or has been exposed to loss through his default, in which case English law assumes, as to the one, a request by the defendant to the plaintiff to pay the money so paid and a promise to repay it, and, as to the other, a request by the defendant to incur the loss and a promise to recoup the plaintiff for it; or (2) those in which money, which really belongs to the plaintiff, is received by the defendant, in which case the law assumes a promise by the defendant to pay it to the plaintiff.

Cases of this description are known to English lawyers as "contracts implied in law" as opposed to "contracts implied in fact." Express provision is made for them in the present Act, the fictitious contract being superseded by a direct duty imposed by law—see Chapter V.

As to the implied promises dealt with in the present section, the only difference between them and express promises is in the mode of substantiating them. In the one case the evidence consists of express words, written or spoken, stating such a promise :

(a) *Telegraph Company v. McLean*, L. R., 8 Ch., 658.

(b) L. R., 9 Ex., 163 ; [*In Ex. Ch.*,] L. R., 10 Ex., 112.

in the other it consists of facts relating to the conduct or circumstances of the parties which show that a promise was intended.

A contract to pay interest is very frequently implied from usage; but, in the absence of such usage, an express stipulation is necessary in order to make it chargeable. This is the common law rule, and has been applied by the Privy Council to cases heard on appeal from India (a).

A mercantile usage to pay interest exists in the case of such instruments as bills of exchange and promissory notes; and the liability may also be established in other cases from the customary course of dealing between the parties (b), and even compound interest may so be claimed. The fact that the interest claimed exceeds the principal sum due does not, since the passing of Act XXVIII of 1855, disentitle a party to recover it (c).

Interest may in some cases be recovered as damages, when it cannot be claimed as part of the debt. Thus, where a mortgagor covenanted to pay principal and interest on a given day, but the deed did not contain any covenant to pay interest after that day, it was held, that interest accruing after that day could not be recovered on the ground of contract as part of the debt, though it might be awarded as damages for the detention of the debt (d). *Primâ facie* the rate of interest would be the measure of damages, but where the rate is excessive and extraordinary, the Court refuses to adopt it as a measure (e). In an action against a vendor of land for breach of contract in not completing the purchase, interest on the deposit-money may be recovered as special damage for the loss of the use of the money (f).

By Act XXXII of 1839, it is provided that the Court may, upon all debts or sums certain payable at a certain time or otherwise, allow, if it shall think fit, interest to the creditor not exceeding the current rate, from the time when such debts, &c.,

(a) *Juggomohun Ghose v. Kaisreechund*, 9 M. I. A., 256.

(b) *Bruce v. Hunter*, 3 Camp., 467.

(c) *Annaji Rau v. Ragubai*, 6 Mad. H. C., 400. See also *Omda Khanum v. Brojendro Coomar Roy Chowdhry*, 12 B. L. R., 451.

(d) 1 Wm.'s Saund., 201, n. (r); *Price v. G. W. R. Co.*, 16 M. & W., 244.

(e) *Cook v. Fowler*, L. R., 7 H. L., 27; *Deen Doyal Lall v. Het Narain Singh*, I. L. R., 2 Cal., 41.

(f) *Maberley v. Robins*, 5 Taunt., 625.

were payable, if they were payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand shall have been made in writing, so as such demand shall state to the debtor that interest will be claimed from the date of such demand until the time of payment. So in an action for the balance due on a promissory note payable on demand, the Court refused to allow interest, there being no proof of a demand in writing (a). As this Act is not applicable to suits for contribution, it is in the discretion of the Court to allow or refuse interest on the amount claimed, whether there has been a written demand for it or not (b).]

CHAPTER II.

OF CONTRACTS, VOIDABLE CONTRACTS, AND VOID AGREEMENTS.

10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void (1).

What agreements are contracts.

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing (2) or in the presence of witnesses, or any law relating to the registration of documents (3).

[(1) Competence of the parties, freedom of assent, lawfulness of consideration, and lawfulness of object are, accordingly, the four points to be looked to in considering whether an agreement is enforceable by law or, in other words, is a contract—Section 2, para. (h). An agreement which satisfies the requirements of the Act in these particulars is enforceable, unless it is expressly declared void. Competence is dealt with in the two following sections: assent, as affected by various circumstances, in Sections

(a) *Bank of Hindustan, &c., v. Wilson*, 1 B. L. R., O. C., 41.

(b) *Bistoo Chunder Bannerjee v. Nithore Monee Dabee*, 10 B. L. R., 352.

13—22; consideration and object in Sections 23—25: while the remainder of the Chapter sets out certain agreements which are expressly declared to be void. Another class of void agreements, those, namely, which are or which become impossible, or which subsequently to the making become unlawful, are provided for in Section 56.

(2) The sections of the Statute of Frauds, which necessitated that certain contracts in the Presidency-towns, in cases governed by English law, should be in writing, are repealed by the Act. There are now but few agreements in British India to the validity of which a writing, or the presence of witnesses, is essential. "In no case," says Scotland, C. J., "does Hindu law appear absolutely to require a writing, though as evidence it regards and inculcates a writing as of additional force and value (a). . . . There are instances, no doubt, in which works of authority speak expressly of particular transactions being evidenced by writing. But I believe in no case can it be considered now that the Hindu law is treated in this respect as being anything more than directory."

A writing, however, is necessary in the following cases: the acceptance of an inland bill of exchange in cases governed by English law must be in writing—Act VI of 1840, Section 2: proceedings to enforce the terms of a tenancy in the Madras Presidency are, in the cases specified, unsustainable unless puttas and muchilkas have been exchanged, or tendered, or both parties have agreed to dispense with them—Act VIII of 1865 (Madras), Section 7: in suits between landlord and tenant under the Oudh Rent Act (XIX of 1868), a tenant is not liable to pay rent other than the rent payable for the last preceding year, unless an agreement by the tenant to pay such rent is proved in writing: by Act IX of 1867 (Madras), Section 4, all contracts entered into with the Municipal Commissioners, in respect of any sum exceeding 100 rupees, shall be in writing and shall be sealed with the common seal of the Commissioners, and shall be varied and discharged in a similar manner. Contracts made on behalf of any Municipal Committee under Act IV of 1873 (Panjáb), in respect of any sum exceeding 20 rupees in

(a) *Mantena Rayaparaj v. Chekuri Ventaraj*, 1 Mad. H. C., 100.

amount or value, must be in writing and signed by the President or Vice-President (if any) and at least two other members of the Committee—Section 18. By Section 54, Act IV of 1876 (Bengal), contracts made on behalf of the Commissioners of the town of Calcutta in respect of any sum exceeding one thousand rupees, or in respect of any property exceeding one thousand rupees in value, shall be in writing and signed by the Chairman (or in his absence by the Vice-Chairman) and ten other Commissioners, and shall be sealed with the seal of the Commissioners. As to contracts entered into by Commissioners of Mofussil Municipalities, see Section 39, Act V of 1876 (Bengal). The powers of the Municipal Commissioner of Bombay of contracting on behalf of the Corporation, and the mode in which those powers are to be exercised, are defined by Act III of 1872 (Bombay), Section 54.

(3) Section 49 of the Registration Act (III of 1877) provides that no document of which the registration is compulsory under Section 17, *viz.* :—

- (a) instruments of gift of immoveable property ;
 - (b) other non-testamentary instruments dealing with an interest of the value of Rs. 100 and upwards ;
 - (c) non-testamentary instruments acknowledging the receipt of the consideration for any such interest so dealt with ;
 - (d) leases of immoveable property from year to year or for any term exceeding one year, or reserving a yearly rent (not being certain leases which the Local Government can specially exempt from registration) ;
 - (e) authorities to adopt a son executed after 1st January, 1872, and not conferred by will,
- shall, if unregistered, affect any immoveable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power.

Section 50 provides that any document, belonging to the first two classes of documents which, under Section 18, may, but need not, be registered, *viz.* :—

- (1) instruments (other than instruments of gift and wills) affecting any interest in immoveable property of a value less than 100 rupees ; or
- (2) instruments acknowledging the receipt of any considera-

tion on account of the creation, assignment, &c., of any interest in immoveable property less than rupees 100,

shall, if registered, take effect, as regards the property comprised therein, against every unregistered document relating to the same property and not being a decree or order of Court, whatever be the nature of the unregistered document.

The effect of this provision is that, though the transactions referred to do not require a writing for their validity in the first instance, and though, when reduced to writing, they may, if unregistered, be subsequently rescinded or modified by word of mouth, still if there be a writing, and that writing is registered, it will take effect against every unregistered document affecting the same property. Such a registered document would also, by Section 92, Proviso (4), of the Indian Evidence Act, 1872, exclude evidence of any subsequent oral agreement modifying or rescinding it. It is to be observed that the provisos of Section 50 of the Registration Act apply only to the two classes of documents mentioned, and that in every other case a subsequent writing, although unregistered, may, so far as that section is concerned, rescind or modify an antecedent registered document.]

11. Every person is competent to contract who is of the age of majority according to the law to which he is subject (1), and who is of sound mind, and is not disqualified from contracting by any law to which he is subject (2).

Who are competent to contract.

[(1) For all persons domiciled in British India, it is enacted by Act IX of 1875 that the period of minority shall last until the completion of the eighteenth year. From this rule, however, are excepted those persons who have guardians appointed for them by a Court, or are brought under the charge of the Court of Wards; in their case majority being attained only on the completion of the twenty-first year. The Act, moreover, is declared not to affect (1) the capacity of any person to act in matters of Marriage, Dower, Divorce, and Adoption; (2) the religion or religious rites and usages of any class of Her

Majesty's subjects in India ; or (3) the persons who had attained majority under the law as it existed before the Act came into force, *i. e.*, before the 2nd June, 1875. Questions of majority which thus remain untouched by this Act have to be decided either according to the personal law of the individual, or according to the special laws which were enacted for particular purposes in particular localities, and had therefore only a partial or a local application.

Under Hindu law minority lasts until the close of the 15th year. Under Muhammadan law majority depended on attainment of puberty ; if no signs of puberty are shown to exist, a boy's puberty is considered to be established on the completion of his 18th year, a girl's on the completion of her 17th year. Some authorities, however, considered that, on the completion of the 15th year, a person of either sex attained majority. By English law majority, in the case of either sex, is attained at 21. These general laws were, however, even previous to the passing of the Indian Majority Act, to a large extent superseded by special enactments. In the first place, whenever the question of minority arose in connection with the limitation of suits, or the acquisition of ownership by possession, a minor was defined by Act IX of 1871 as a person "who has not completed his age of 18 years." The same rule existed for cases under the Indian Succession Act, which is now superseded, as regards this point, by Act IX of 1875. In Lower Bengal a minor, if subject to the jurisdiction of the Court of Wards, is declared by Act IV of 1870 (Bengal), Section 1, to mean "a person under the age of 18 years." As to persons not so subject, and not being European British subjects, the law in Lower Bengal and the North-Western Provinces, as it existed previous to the passing of the Indian Majority Act, is laid down by Act XL of 1858, Section 26 of which provides that every person "shall be held to be a minor who has not attained the age of 18 years." Some doubt was felt as to whether this Act operated within the local limits of the High Court's jurisdiction ; this was, however, cleared away by a Full Bench decision of the Calcutta High Court (*a*), in which it was laid down that the minority of a Hindu,

(*a*) *Cally Churn Mullick v. Bhnggobutty Churn Mullick*, 10 B. L. R., F. B. R., 261.

resident and domiciled in the town of Calcutta, and not possessed of any property in the mofussil, terminates at the end of 15 years. This Act applies, not only to proprietors of land paying rent to Government, but to all persons not being British subjects (a). It was extended by Act IV of 1872 to the Panjáb. The period of minority for persons subject to the Court of Wards in the North-Western Provinces was, by Regulation II of 1803, Section 32, "limited to the expiration of the 18th year." In the Madras Presidency the minority of persons subject to the jurisdiction of the Court of Wards was declared by Regulation V of 1804, Section 4, to continue until the completion of the 18th year. In the Bombay Presidency the subject was regulated by Act XX of 1864, by Section 30 of which a minor is defined as a person "who has not attained the age of 18 years."

As regards European British minors, the subject was regulated in the Panjáb, Oudh, the Central Provinces, British Burmah, Coorg, Ajmere and Mairwara and Assam by Act XIII of 1874, according to which minority continues until a person has completed the age of 18 years.

These enactments are now only of importance in respect of persons who claim to have attained majority before the present Majority Act came into force.

As to the effects of minority in the case of agents, see Section 184.

As to necessities supplied to a minor or to a person whom a minor is bound to support, see Section 68: and as to the position of a minor partner in a firm, Sections 247 and 248.

The Act says nothing about the ratification made after attaining majority by persons who have contracted during minority. In England the matter is regulated by Statutes, and no action can be brought upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification, unless such promise or ratification has been made in writing signed by the party (b). The writing, in order to operate as a ratification, must show a recognition by the debtor after he has attained majority of the debt as a debt binding on him. A

(a) *Lakhikant Dutt v. Jagabandhu Chuckerbutty*, 3 B. L. R., App., 79.

(b) 9 Geo. IV, c. 14.

recognition of a debt incurred in infancy and a promise to pay it "as a debt of honor" when of ability, have been held not to be a ratification within the meaning of the Statute (a). But 37 & 38 Vict., c. 62, provides that all contracts by infants except for necessities shall be void, provided that the enactment shall not invalidate any contract into which an infant might by any existing or future Statute, or by the rules of common law or equity, enter, except such as then by law were voidable; and by Section 2 an action cannot be brought on a ratification of an infant's contract made after full age. 9 Geo. IV, c. 14, has not been expressly repealed by this Statute, although it may be well contended that it has been superseded (see Pollock on Contracts, p. 41).

(2) According to English law (except in cases (b) to which the Married Women's Property Acts, 38 & 34 Vict., c. 93, and 37 & 38 Vict., c. 50, apply) a wife has no right to make any contract except with the authority, express or implied, of her husband, authorizing her to act as his agent. While the wife is living with the husband, it is presumed that she has her husband's authority to contract for necessities suitable to his degree and estate (c).

But the husband is not liable for his wife's contracts if the facts are such that the Court infers that he did not hold out that his wife had authority to pledge his credit (d). If the wife is not living with the husband, no presumption arises that she has authority to bind him even for necessities: the onus lies on the wife to prove such authority (e). But a married woman can dispose of and bind her separate estate, and her separate estate will be bound by her general engagements in writing which do not refer to or even mention it (f).

The subject is governed in this country, so far as Europeans are concerned, by two enactments. In the first place, Section 4 of the Indian Succession Act provides that no person shall

(a) *Rowe v. Hopwood*, L. R., 4 Q. B., 1; *Maccord v. Osborne*, 1 C. P. D., 568.

(b) *Jolly v. Rees*, 33 L. J., C. P., 177.

(c) The operation of these Statutes appears to be limited to England and Ireland.

(d) *Mainwaring v. Leslie*, M. & M., 18.

(e) *Hulme v. Tenant*, 1 W. & T. L. C., 824.

(f) *Manby v. Scott*, 2 Sm. L. C., 396 *et seq.*

by marriage (*i. e.*, a marriage since 1st January, 1866) become incapable of doing any act in respect of his or her property which he or she could have done if unmarried. The operation of this section appears, however, from Section 44, to be restricted to cases in which one of the persons married is domiciled in British India, and it will not accordingly affect the marriages of persons resident in India but having their domicile elsewhere (*a*). Nor will the section prevent the operation of a clause in a marriage-settlement in restraint of anticipation, and where the marriage was contracted after the passing of the Indian Succession Act (*b*).

In the next place Act III of 1874 (Married Women's Property Act) enacts, as regards married women who did not, or whose husbands did not, at the time of their marriage profess the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion, that (1) the wages and earnings of a married woman shall be her separate property, Section 4 : (2) that she may maintain a suit in respect of any property which, under that Act or the Indian Succession Act, is her separate property, Section 7 : (3) that debts contracted by a married woman with reference to, or on the strength of, her separate property shall be satisfied out of that property : (4) that a husband married after 31st December, 1865, shall not be liable for the wife's ante-nuptial debts. It has been held that this Act does not operate retrospectively (*c*).

As to property which is acquired by or devolves upon a married woman after a decree of judicial separation, see Act IV of 1869, Section 24.

The following are the remarks of Sir Thomas Strange on the position of Hindu women :—"To consider, next, the case of the *wife*, and other dependent members of a man's family, with reference to the power in question of contracting. And, as respects the wife, it may be taken to be commensurate with her right of property, as consisting in her *stridhana*, *land* excepted ; the exception applying, in the Bengal provinces, only to such as may have been given her by her husband, of which she certainly

(*a*) *Miller v. Administrator-General of Bengal*, I. L. R., 1 Cal., 412.

(*b*) *Peters v. Manuk*, 13 B. L. R., 383.

(*c*) *Peters v. Manuk*, 13 B. L. R., 383 ; *Sanger v. Sanger*, L. R., 11 Eq., 470, on 33 & 34 Vict., 93, the corresponding Statute in England ; see also, as to its operation, *Ashworth v. Outram*, 5 Ch. D., 923.

cannot *dispose*, and with regard to which it follows that she cannot *contract*. Beyond this it is laid down very generally in many places that for *necessaries* in support of the family, including herself, she may bind her husband by her contracts, as a man's slave even has power to do according to Menu. The case usually put is that of the *absence of the husband from home*, when it is but reasonable that, while it continues, an authority should subsist somewhere to provide for his family. It is in the *absence of his master* that Menu confers this right upon the slave. But absence in these texts is construed to be illustrative only, and accordingly, Catyayana extends it to disability in the husband to act arising from whatever cause, as for instance, from incurable disease; including, among necessities for which provision may be made at his expense by others, the nuptials of his daughter, or disbursements for funeral-rites. And all this (he says) may be done by his servant, his wife, his mother, his pupil or his son, *without his assent*, though in another text he supposes his assent to have been given, unnecessarily, as the law would imply it; but such implication may be rebutted by proof of his having withheld it or otherwise; in which case, there could be no recovery against him, though it should appear that he had left his family destitute. In certain trades, in which the wife is understood to have special concern, she has a greater latitude; and, universally in proportion as the management of the family is confided to her, he is bound by her contracts" (a). It has been held that, where a Hindu wife makes a contract under such circumstances as not to make her husband liable, she does render herself liable, but only to the extent of any *stridhan* she may have (b).]

12. A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

What is a sound mind for the purposes of contracting.

(a) Strange's Hindu Law, 4th ed., 276.

(b) Nathubhai Bhailal v. Javher Raji, I. L. R., 1 Bom., 121.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations.

(a.) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b.) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

[The expression "forming a rational judgment as to its effect upon his interests" implies that there must, in order to constitute soundness of mind, be something more than a bare understanding of the terms of the contract; there must be a capacity to realize its effects upon the contracting party and to form a rational judgment about the effect so realized.

According to English law a contract made with a lunatic by a person unaware of his lunacy, will not be cancelled if it has been executed so that the parties cannot be restored to their original position (a). And the ordinary form of plea raising the defence of insanity is that "at the time when the defendant made the alleged promise he was of unsound mind and thereby incapable of understanding it, *as the plaintiff then well knew*" (b).

On this principle it has been held (c) that "dealings by way of sale and purchase with a person apparently sane, but found to be insane, would not be set aside as against those who had dealt with him on the faith of his being a person of sound understanding." A Court of Equity, however, though it will not cancel a contract made by a lunatic, if the other party had no notice, will not grant specific performance of it (d). Under the present Act

(a) *Molton v. Camroux*, 2 Ex., 487.

(b) *Bullen & Leake*, 606.

(c) *Elliot v. Ince*, 26 L. J., Ch., 821.

(d) *Hall v. Warren*, 9 Ves. Jun., 605.

these distinctions are disregarded, and the only point to be looked to will be the mental condition of the contracting party at the time when the contract was entered into. In the case of incapacity being established, the contract will be void, and any one who has received money or other consideration under it, will be bound under Section 65 to restore it or to make compensation.

There is a presumption, in the first instance, in favor of sanity; but general lunacy being established, the onus lies on the party alleging a lucid interval, to prove, not merely a cessation of violent symptoms, but a restoration of mind sufficient to enable the party to judge correctly of his act (*a*). When a party without authority, but *bond fide*, assumes the management of the property of one mentally incompetent, the Court of Chancery will not, on his recovery, restore to him his property without making an equitable provision for expenses and liabilities (*b*).

This section is so framed as to include contracts by persons in a state of drunkenness; and Illustration (*b*) shows that this is the intention. Such contracts would, accordingly, be wholly void. This is a departure from English law, under which, in a recent case, it was decided that a contract of a man, too drunk to know what he is about, is *voidable* only, and not void, and therefore capable of ratification by him when he is sober (*c*). Indeed mere drunkenness of the contracting party is not generally a ground on which the English Courts will set aside a contract. "A Court of Equity," said Sir W. Grant (*d*), "ought not to assist a person to get rid of any agreement or deed merely on the ground of his having been intoxicated at the time," provided that no unfair advantage was taken of him, and that there was no contrivance to lead him into drink, in which case he would be a proper object for relief.

The case of necessities supplied to a lunatic or drunken person, or those whom such person is bound to support, is provided for in Section 68.

(*a*) Hall v. Warren, 9 Ves, 611.

(*b*) Selby v. Jackson, 6 Beav., 192.

(*c*) Matthews v. Baxter, L. R., 8 Ex., 132.

(*d*) Cooke v. Clayworth, 18 Ves., 12.

The views adopted by the English law with regard to insanity and its effects upon contract have made it unnecessary to define with precision the sanity which is requisite to a capacity for contracting. As to wills, however, there are numerous cases in which the question has been discussed, and the principles approved in one of the most recent seem to have been adopted by the framers of this section. The conclusion arrived at in *Banks v. Goodfellow* (a) seems to be that an insane man may make a valid will provided the act is not influenced by the disordered feelings or derangement of intellect which have been caused by his disease. In the course of an elaborate judgment, Cockburn, C. J., said: "It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects, shall understand the extent of the property of which he is disposing, shall be able to comprehend and appreciate the claims to which he ought to give effect, and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it, which, if the mind had been sound, would not have been made. Here then we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections or the moral sense become perverted by mental disease: if insane suspicion or aversion take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions and to lead to a testamentary disposition due only to their baneful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand."

Though the importance of sanity is more conspicuous in some departments of law than in others, it would seem rational that a uniform principle should guide in all cases. This, however, has not been so in English law, for the test of sanity adopted in criminal cases makes no place for the considerations which govern the Courts in dealing with testamentary dispositions.

(a) L. R., 5 Q. B., 549.

The rule of English law which is followed in the Penal Code (Section 84) makes the test of a man's responsibility his capacity to know the nature of the act which he is doing, or that he is doing what is either wrong or contrary to law. Strictly, therefore, a man may be punished for an act which he has done under the uncontrollable impulse of a diseased mind, that state not being incompatible with the existence of knowledge that the act is wrong. The Prussian Penal Code lays down a proposition which would be equally applicable to civil and criminal law: "An act is not punishable when the person at the time of doing it was in a state of unconsciousness or of disease of mind by which a free determination of the will was excluded."]

13. Two or more persons are said to consent when they agree upon the same thing in the same sense.

"Consent" defined.

[To determine what are the essentials of consent, is equivalent to determining what kinds of error or misunderstanding are incompatible with its existence. Persons may, notwithstanding that one or both of them labour under some mistake, yet consent; but error in certain matters absolutely excludes the possibility of consent. Of such kind is error in respect of person: thus, where A ordered goods of B, with whom he had been in the habit of dealing, and C, who had bought B's good-will, supplied the goods without giving notice of the change, it was held that there was no contract between A and C, inasmuch as A had never intended to deal with him; there was entire absence of consent (a). So again, if a person sells goods to A B, or has been led to believe that he has so sold them, and delivers them, as he supposes, to A B, and the person who has led him into that belief receives and carries off the goods, there has been no consent, and therefore no selling to the person who has fraudulently represented himself as servant or agent of A B; the consequence of which is that he cannot confer a good title on any one else, the property never being vested in him (b). Cases of this sort illustrate the difference

(a) *Boulton v. Jones*, 27 L. J., Ex., 117.

(b) *Lindsay v. Cundy*, 2 Q. B. D., 96.

between error which excludes consent and other error, for where the error is not of this essential character, the property does pass to the purchaser, and the purchaser can confer a good title on a third party. Error, again, in respect of the thing which is the object-matter of the agreement, excludes the possibility of consent. The parties must agree not merely in the same words but "in the same sense:" accordingly, where it appears that, though the same language is employed, each party was in fact agreeing to a different thing, there is no assent. Thus, where defendant contracted for "125 bales of Surat cotton to arrive ex *Peerless* from Bombay," and he pleaded, on being sued for non-acceptance, that the cotton which he contracted to buy was on another ship *Peerless* which sailed from Bombay in October, and that the cotton which the plaintiff sued him for not accepting was on a ship *Peerless* which sailed in December: it was held that there was no *consensus ad idem*: each party meant something different by the *Peerless*; though there was verbal identity, they did not "agree in the same sense" (a). Similarly, where, in a sale of "10 tons of sound merchantable hemp," the seller meant to sell *Saint Petersburg* hemp, and the buyer to buy *Riga* hemp, a superior article; the broker made a mistake in describing the hemp to the buyer; there was held to be no contract, the assent of the parties not having really existed as to the same object-matter of sale (b).

In *Smidt v. Tiden* (c) the parties had contracted through a broker, who executed a different charter-party with each, the bill of lading being equally applicable to either charter-party, it was held that there had been no contract *ad idem*, and that consequently no action could be brought on the bill of lading.

On the other hand, if the parties are agreed as to the thing, a mistake in the name is immaterial. In an insurance-case in which the policy had designated the ship on which the goods were carried by a wrong name, the jury found that neither party cared what the name of the ship was, as they meant to insure the goods by the ship on which they were really shipped.

(a) *Raffles v. Wichelhaus*, 33 L. J., Ex., 160.

(b) *Thornton v. Kempster*, 5 Taunt., 786.

(c) L. R., 9 Q. B., 446.

The contract was accordingly held good notwithstanding the mistake (a).

It must be remembered, however, that where a person has expressed a meaning, he is generally precluded from showing that he intended something different from that which he expressed. Where the terms of a contract, grant or other disposition of property have been reduced to writing, Section 91 of the Indian Evidence Act prohibits proof of them in any other manner than by the document itself; and Section 92 excludes oral evidence offered in contradiction or variance of it: and even where there has been no written agreement, a person, who has by his declaration, act or omission caused another person to believe something and to act upon that belief, is estopped under Section 115 of the same Act from denying the truth of the thing so believed and acted upon. The general rule is, that a party can claim to have a contract interpreted in the sense in which he believed it, at the time of making the contract, to be understood by the other party. If it is impossible from the language or acts of the parties to ascertain this, the contract is void for uncertainty under Section 29. But in order "to agree in the same sense" it is not necessary that the minds of the contracting parties should be in accordance on every circumstance collateral to the contract. A man, for instance, may buy a thing, and if he gets what he means to buy, he cannot, because the thing bought proves unavailing for some purpose which he expected it would answer, plead that he did not assent to the purchase (b).

So, again, if each party is thinking of the same parcel of goods, the fact of their beliefs as to the quality being different does not invalidate their consent. In *Smith v. Hughes* (c) it was argued that because the defendant intended to buy old cats, and the plaintiff to sell new, there was no *consensus ad idem*, and, therefore, no contract. But Cockburn, C. J., said: "This argument proceeds on the fallacy of confounding what was merely a motive operating on the buyer to induce him to buy,

(a) *Ionides v. Pacific Insurance Company*, L. R., 7 Q. B., 517.

(b) *Chanter v. Hopkins*, 4 M. & W., 399.

Propositions as to estoppel by conduct—*Carr v. L. & N. W. R. Co.*, L. R., 10 C. P., 307.

(c) L. R., 6 Q. B., 597.

with one of the essential conditions of the contract. Both parties were agreed as to the sale and purchase of this particular parcel of oats. . . . All that can be said is, that the two minds were not *ad idem* as to the age of the oats; they certainly were *ad idem* as to the sale and purchase of them." If, in that case, there had been two parcels of oats, one of new, the other of old, and nothing to indicate which of the two was intended to be sold, then, if the plaintiff had intended to sell the new oats and the defendant to buy the old, there would have been an absence of consent. See notes to Sections 20 and 22, *post*, and Indian Evidence Act, Sections 94—96.]

"Free consent" 14. Consent is said to be free when defined. it is not caused by—

- (1) coercion, as defined in section fifteen, or
- (2) undue influence, as defined in section sixteen,
or
- (3) fraud, as defined in section seventeen, or
- (4) misrepresentation, as defined in section
eighteen, or
- (5) mistake, subject to the provisions of sections
twenty, twenty-one and twenty-two.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

[The fact that there has been coercion or any other of the circumstances mentioned in the section does not absolutely negative the presence of will. The transaction so affected, though impeachable, is not, therefore, necessarily void. On the other hand, there may be such force or fraud as to exclude the notion of will and to make the transaction void, as not being the act of the person to whom it is imputed. For instance, where a person is compelled by direct physical force to execute an instrument, or where his name is forged to it, no will has been exercised by him, and therefore no legal transaction has arisen. The distinction between a transaction which

is absolutely null and void and one which is voidable, is, that the former cannot be ratified or confirmed, the latter may be (a).

"Is the transaction void in itself? If so, there can be no confirmation of such; but a transaction voidable only from circumstances of suspicion, however strong, may undoubtedly be confirmed by a subsequent deliberate act of the party, who might originally probably have succeeded in having it declared void" (b). An illegal contract is void; a contract obtained by fraud is voidable: nothing can validate the former, the validity of the latter depends upon the option of the party who has been deceived. The distinction is of importance if the right of the deceived party to ratify comes into question.]

15. "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation. — It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustration.

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although Section 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

[Sections 15 and 16 refer to two classes of actions which interfere with freedom of assent,—the one of an avowedly violent character, the other more subtle and intangible, but none the less effective.]

(a) *Foster v. Mackinnon*, L R., 4 C. P., 704.

(b) *DeMontmorency v. Devereux*, 7 Cl. & Fin., 188, *per* Ld. Chancellor at p. 230; *Chesterfield v. Janssen*, 1 W. & T. L. C., 592.

The two sections are intended to comprise every case in which an unfair advantage is taken by one party to a contract, so as to prevent the other from being a perfectly free agent; and there are many cases which might with equal propriety be regarded as falling under one section or the other.

Coercion, as defined in this section, corresponds for the most part with the "duress" known to English law; but the definition lacks several of the limitations recognized in that and other systems. Under the present section, any act, or the threat of any act, forbidden by the Penal Code, whether affecting goods or person, may constitute coercion; and the wrongful detainer of property, the only civil wrong, probably, which is not also an offence under the Code, is expressly mentioned as one form of coercion. In the Roman and English systems fear is not regarded as a ground for avoiding a contract, unless it be the present well-grounded fear of a man of ordinary firmness. It is therefore considered that the menace must be directed against the life or liberty of a man or of his family, and not merely against his goods.

"The fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert" (a). A person is not accordingly, under English law, entitled to avoid a contract on the ground of mere duress of goods; but money extorted by such means can be recovered back, such extortion rendering it inequitable that the defendant should retain the money, as he might under Section 72. The distinction does not seem to be maintained in the Act.

The act charged as coercion must be unlawful. "If a man be imprisoned by order of law, the plaintiff may take a feoffment of him or a bond for his satisfaction and for the deliverance of the defendant" (b). However, imprisonment in a country where there is no settled system of law or procedure, and where the Judge is invested with arbitrary powers, is a very different thing from imprisonment in a country where the length and severity of it are defined by law and cannot be exceeded, and may amount to duress so as to entitle the person, who has, while suffering

(a) *Skeate v. Beale*, 11 A. & E., 983.

(b) 2 Inst., 482.

it, been induced to enter into a contract, to repudiate such contract (a).

While in this Act the notion of coercion is purposely extended, there is nothing to limit it to such acts or threats as might be supposed to exercise a constraining force upon a man of ordinary firmness. Of course, however, the circumstance that the threats employed were not of such character would be ground for inferring that the person's consent was not really caused by them.

Again, under this section, the force or threats may be directed against *any one whatever*; whereas, according to the Roman and English systems, force or threats directed against a stranger to the contract are not ground for avoiding it (b). Threats against the tranquillity or honor of a man's family form the only exception. Thus, the decision in *Williams v. Bayley* (c) is partly put upon the ground that the father's consent was wrung out of him by threats to prosecute his son for forgery. Further, under this section, the force or threats may, it would seem, proceed from any person; whereas the duress of English law can only proceed from the person obtaining the contract or his agent, or some one acting with his knowledge and assent. In this respect the Act follows the rule of Roman law, according to which it is indifferent who causes the fear and against whom the threat is used. To this rule, however, one exception appears to have been admitted. The excepted case is that of a person falling into the hands of thieves and offering to a passer-by a reward in order to induce him to attempt a rescue. A promise given under such circumstances, though obtained by force or threats, was still held to be valid.]

"Undue influence" defined.

16. Undue influence is said to be employed in the following cases:—

(1.) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confi-

(a) *Moung Shoay Att v. Ko Byaw*, L. R., 3 I. A., 61; I. L. R., 1 Cal., 830; *Marriott v. Hampton*, 2 Smith's L. C., 413.

(b) *Smith v. Monteith*, 13 M. & W., 427.

(c) L. R., 1 H. L., 200.

dence or authority for the purpose of obtaining an advantage over that other, which, but for such confidence or authority, he could not have obtained:

(2.) When a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that, to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion.

[This section was much discussed in Council at the passing of the Act. The Lieutenant-Governor of Bengal considered that it did not go far enough in making provision for the case of contracts entered into by persons whose social inferiority, ignorance or inexperience were likely to be taken advantage of by those with whom they dealt, for the purpose of driving a hard bargain; and he proposed as an additional illustration to the section the case of a rich and powerful zemindar who induces poor and ignorant ryots, holding under him, to engage to grow certain produce for a term of years on conditions to which an independent ryot would not have consented. It was urged on the other hand, that it would be dangerous to entrust the Courts with the power of setting aside any bargain which they considered oppressive, and that ample relief was afforded by the section. The illustration proposed by the Lieutenant-Governor was ultimately abandoned, and the Council at the same time determined to omit the other illustrations which had been annexed to the section. The illustrations show, nevertheless, the sort of cases with which the section is meant to deal, and may still be useful in explaining, though not authoritatively, the nature of that undue influence which renders a contract voidable.

Illustrations.

(1.) "A, a young woman who has resided during her minority in the family of B, her guardian, continues to reside with him after attaining majority, and is induced, by means of his influence, to enter into a contract with him which is disadvantageous to herself. B employs undue influence.

(2.) A, having advanced money to his son, B, during his minority, upon B's coming of age, obtains, by parental influence, a bond from B for a greater amount than the sum due upon the advance. A employs undue influence.

(3.) A is induced, by B's influence over him as his legal adviser, to convey an estate to B for his benefit. B employs undue influence.

(4.) A, a man enfeebled by disease or age, is induced by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional assistance during the rest of A's life. B employs undue influence."

The influences referred to in this section are of a moral, as opposed to a physical character, such as those dealt with in Section 15 as 'coercion.' The first class consist of cases where the relationship between the parties is so used as to obtain an advantage for one of them, which he would not otherwise have enjoyed. The second is where the enfeebled condition, mental or bodily, of one of the parties is made to serve a like purpose. In the first class come transactions between attorney and client, doctor and patient, guardians and wards, trustees and *cestuis que trust*, spiritual advisers and those whom they advise; wherever, in fact, a real or apparent authority is calculated to give one party to the transaction the means of dictating terms, and to rob the other party of perfect freedom of will. As to all such cases the law presumes fraud in any transaction, and throws on the person in whom confidence is placed the burthen of showing that he acted *bonâ fide* (a).

When an attorney enters into a contract with a client in respect of the subject of litigation, undue influence is presumed to have been exercised, and the purchaser is bound to show that all the terms of the contract are fair, equitable, and reasonable (b).

The question as to what influences are legitimate in the case of a testator was discussed by Lord Penzance in *Hall v. Hall* (c), and his observations illustrate the principles applicable to contracts:

"Impunity or threats, such as the testator has not the

(a) Indian Evidence Act, Sec. 111.

(b) R. A. Pushong v. Munia Halwani, 1 B. L. R., A. C., 95.

(c) L. R., 1 P. & M., 481.

courage to resist,—moral command asserted and yielded to for the sake of peace and quiet, or of escaping from distress of mind or social discomfort,—these, if carried to a degree in which the free play of the testator's judgment, discretion or wishes is overborne, will constitute undue influence, though no force is either used or threatened. In a word, a testator may be led but not driven; and his will must be the offspring of his own volition, and not the record of some one else's."

In *Lyon v. Home* (a), the plaintiff was a widow of advanced years and of a visionary temperament. The defendant, who represented himself as a spiritual medium between the living and the dead, induced her to believe it to be her late husband's wish that the defendant should be treated as their adopted son. By this and similar representations the defendant induced the plaintiff to execute deeds transferring large sums to him. The object of the suit was to set these aside: *Giffard, V. C.*, held, that "beyond all doubt there is plain law and plain sense to forbid and prevent the retention of acquisitions such as these by any 'medium,' whether with or without 'a strange gift:'" and that this should be so is of public concern and, to use the words of Lord Hardwicke, 'of the highest public utility.'"

A good instance of 'undue influence' operating by means of the mental distress of one of the contracting parties, is given in *Williams v. Bayley* (b), a case which was much discussed in the House of Lords. In that case a son had forged his father's name, and deposited the forged documents with certain bankers; the bankers, on discovery of the forgery, had put 'pressure' on the father, without, however, distinctly threatening a prosecution, and had thus induced him to give a security for the son's debt. The security was declared invalid in the House of Lords, Lord Westbury observing as follows:—

"The question, therefore, my Lords, is, whether a father appealed to under such circumstances, to take upon himself an amount of civil liability, with the knowledge that, unless he does so, his son will be exposed to a criminal prosecution, with the certainty of conviction, can be regarded as a free and voluntary agent? I have no hesitation in saying that no man is safe,

(a) L. R., 6 Eq., 655.

(b) L. R., 1 H. L., 290, at p. 218.

or ought to be safe, who takes a security for the debt of a felon, from the father of the felon, under such circumstances. A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous condition, or of taking on himself the amount of that civil obligation. I have, therefore, my Lords, in that view of the case, no difficulty in saying that, as far as my opinion is concerned, the security given for the debt of the son by the father under such circumstances, was not the security of a man who acted with that freedom and power of deliberation that must, undoubtedly, be considered as necessary to validate a transaction of such a description.”]

17. “Fraud” means and includes any of the following acts committed by a party
 “Fraud” de-
 fined. to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract (1):—

- (1.)—The suggestion, as a fact, of that which is not true, by one who does not believe it to be true (2);
- (2.)—The active concealment of a fact by one having knowledge or belief of the fact (3);
- (3.)—A promise made without any intention of performing it (4);
- (4.)—Any other act fitted to deceive (5);
- (5.)—Any such act or omission as the law specially declares to be fraudulent (6).

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a

contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech (7).

Illustrations.

(a.) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b.) B is A's daughter and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c.) B says to A, "If you do not deny it, I shall assume that the horse is sound;" A says nothing. Here, A's silence is equivalent to speech.

(d.) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B's willingness to proceed with the contract. A is not bound to inform B.

[(1) Upon this section it is first to be observed that any of the specified acts, done either with intent to deceive another, or to induce him to enter into a contract, amounts to fraud. In England both these conditions are nominally requisite, if any of such acts is set up by way of defence to an action at Common law, or as ground for setting aside an agreement in a Court of Equity. In no case, as it seems, can intent to deceive be dispensed with, except where the matter is used as a defence to a suit for specific performance, or where there is such relation between the parties as is referred to in the last section. The Common law, however, frequently implies intent to deceive, where such intent cannot be proved and is even negatived in fact. Thus, where a man makes a statement which he knows to be false, although he makes it without any fraudulent motive, it is said that the law imputes to him a fraudulent intention. In *Foster v. Charles* (a) the defendant had accepted a bill of exchange in the name of the drawee purport-

(a) 6 Bing., 396.

ing to do so by procuration, knowing that in fact he had no such authority, though he believed that the drawee would ratify his act. The acceptance was, however, repudiated. Although the jury negatived a fraudulent intention in fact, the Court held that the defendant had committed a fraud in law by making a representation which he knew to be untrue, and which he intended others to act upon.

The wording of this section dispenses with the necessity of an intention to deceive, provided the act be committed with an intent to induce the other party to enter into the contract, and thus is in accordance with the law as laid down in the case last cited.

Although, however, it is not necessary in every case, in order to constitute fraud, that the act should have been done with an intention to "induce the other party to enter into the contract," it is nevertheless necessary, in order to render the contract voidable on the ground of fraud, that the contract should have been caused by it. See Explanation to Section 19, and notes thereto. Fraud, therefore, does not render a contract voidable, unless it is shown to be material. There must be "the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer that he would not have entered into it; or the suppression of a fact, the knowledge of which, it is reasonable to infer, would have made him abstain from the contract altogether" (a). If the assertion or suppression is not calculated to produce this effect, it will be no ground for avoiding the contract, whatever may have been the intention of the party.

Lord Brougham, in speaking of the result of the cases, says—
"It is that general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to over-reach go for nothing; that an intention and design to deceive may go for nothing, unless all this dishonesty of purpose, all this fraud, all this intention and design can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract" (b).

(a) *Pulsford v. Richards*, 17 Beav., 87.

(b) *Attwood v. Small*, 6 Cl. & Fin., 447.

In the next place the fraudulent act must, in order to render a contract voidable, have been committed by a party to the contract, or with his connivance, or by his agent. Thus, where an arrangement made between a father and son was impeached on the ground of fraud practised by the father and a third person who assisted in bringing about the transaction, it was observed, "the same identical transaction may be good as to part, though voidable as to other parts. A party with a fraudulent intention of benefiting himself, may with that view be instrumental in procuring an arrangement between parties, to which an objection can be made. Suppose it was part of Mr. Sabine's plan to make an arrangement between the father and the son, in order that he might afterwards deal with the son, the motive would be most improper, but the arrangement between the father and the son would be to be judged of on its own merits" (a). There must be something to connect the person making the representation with the party complaining that he has been deceived by it, and therefore, where a prospectus is addressed to the public inviting them to take shares, those who upon the faith of it apply for and obtain shares may hold the issuers of the prospectus responsible for the truth of its contents; but a purchaser of shares in the market upon the faith of a prospectus which he has not received from those who are responsible for it, cannot by action upon it so connect himself with them as to make them liable to him for the misrepresentations contained in it, as if it had been addressed personally to himself (b). The fraud of a stranger to the contract is immaterial. Thus, a person who has been induced by the fraudulent statement of some one else, not acting on behalf of a Company, to take shares in it, cannot, on the ground of the fraud, repudiate the contract (c). Nor, on the other hand, if a person, deceived by the fraudulent representations of the Company, has bought shares of a shareholder, can he, on the ground of the Company's fraud, get out of his bargain (d).

As to frauds by agents, see *post*, Section 238.

(a) *Bellamy v. Sabine*, 2 Phill., 438.

(b) *Peek v. Gurney*, L. R., 6 H. L., 399.

(c) *Nicol's case*, 28 L. J., Ch., 257.

(d) *Duranty's case*, 28 L. J., Ch., 37.

(2) The first class of acts, which may constitute fraud, are lies, either express or suggested. Here the only question is as to the materiality of the lie. There are many statements which, though untrue, are never intended and never understood to be literally construed, and so convey no wrong impression. Thus, exaggerated commendation in a prospectus, puffing advertisements, the flowery language of an auctioneer in extolling the merits of the article on sale, are all taken for what they are worth and so deceive no one (a). But a specific statement of fact, such as that the timber on an estate is of an average height (b), would, if false and made by a person who either knew it to be false or knew nothing whatever about it, no doubt constitute fraud. For an instance of a contract with promoters of a Company, rescinded on account of fraudulent misrepresentations on the part of its promoters, see *Lindsay Petroleum Company v. Hurd* (c).

According to the English authorities the thing suggested must be a matter of fact; and, accordingly, a misrepresentation of a matter of intention, though it may have influenced the agreement, is not fraud so as to avoid it. It was so held in a case where the defendant represented that he was going to use certain premises for a stated purpose and thereupon the plaintiff granted him a lease of the premises, but the defendant never intended so to use them, and did not in fact so use them (d). The same doctrine was enunciated in *Jorden v. Money* (e) (diss. Lord St. Leonards) and re-affirmed in a recent case in the House of Lords (f). Although the terms of the 3rd and 4th sub-sections may be wide enough to embrace suggestions of intention, yet it is submitted that such suggestions should not be treated as fraudulent, because the person who made them fails to fulfil his intention. In reality a statement of intention, if it amounts to anything, is a promise and should be treated on that footing. See note to Section 19.

(a) *Jennings v. Broughton*, 17 Beav., 234; *Denton v. MacNeil*, L. R., 2 Eq., 352.

(b) *Brooke v. Rounthwaite*, 5 Hare, 298.

(c) L. R., 5 P. C. C., 221.

(d) *Feret v. Hill*, 23 L. J., C. P., 185.

(e) 5 H. L. C., 214; *Laver v. Fielder*, 32 Beav., 1.

(f) *Citizen's Bank of Louisiana v. First National Bank of New Orleans*, L. R., 6 H. L., 352.

(3) 'Active concealment' implies some 'aggressive deceit,' something actually *done* by the party with a view to concealment, as opposed to the mere omission to speak. A person is not bound to disclose all material facts within his knowledge, but he must not use any artifice to conceal them from the other party. Thus, where a vessel was sold "with all faults," but, before sale, the vendor took her from the ways in which she lay, and kept her afloat so as to prevent her bottom, which he knew to be unsound, from being inspected (*a*), and made the false statement that "the hull was nearly as good as when launched," this was held to be fraud. So also turning a log of mahogany, so as to conceal a flaw on one side, would be active concealment (*b*); so also the various artifices employed to conceal the age of horses.

Where an estate was represented as clearing a net value of £90 per annum and there had been, during the treaty, an industrious concealment of the necessity to repair a sea-wall, the bill against the purchaser was dismissed (*c*). So where, upon the sale of a house, the seller, being conscious of defect in a wall, plastered it up and papered it over, it was held that, as the seller had actually concealed it, the purchaser might recover the purchase-money (*d*). In the case of *Peek v. Gurney* (*e*), Lord Chelmsford observed that he was not aware of any case in which an action at law had been maintained against a person for an alleged deceit charging merely his concealment of a material fact which he was morally but not legally bound to disclose. Where the fact is one which could not with the greatest possible attention be discovered, it is doubtful whether mere silence ought not to be considered fraudulent. In such a case there is no occasion for artifice, and a seller who, knowing of a defect, does not disclose it, although at the same time he knows that the buyer cannot possibly discover it, seems on a level with one who, on selling a thing where a defect might be discovered, uses some artifice to conceal it. "The distinction," says Lord St. Leonards, "is but a thin one between

(*a*) *Schneider v. Heath*, 3 Camp., 506.

(*b*) *Udell v. Atherton*, 30 L. J., Ex., 337.

(*c*) *Shirley v. Stratton*, 1 Bro. C. C., 440.

(*d*) *Pickering v. Dawson*, 4 Taunt., at p. 785.

(*e*) L. R., 6 H. L., at p. 390.

a man who has plastered over a rent in the main wall, and then sells subject to all faults, knowing that the purchaser cannot discover this fatal one, which he does not point out, and a man who, knowing that the defect is thus concealed, sells the estate with all its faults without disclosing this, which he knows cannot be discovered; in either case the purchaser is deceived" (a).

According to the English cases a seller of land is bound to acquaint the purchaser with all facts material to the title, and if he knows and conceals such facts, the purchaser is relieved. There can be no doubt that the slightest attempt on the part of a vendor to divert attention or lull suspicion would be held to be to convert innocent silence into active concealment (b).

If the buyer fails to inspect, the concealment of a defect is immaterial, because it has not induced the contract. In *Horsfall v. Thomas* (c), the defendant, on being sued on a bill of exchange given by him for a gun bought of the plaintiff, pleaded that he had been defrauded. The gun had been made to his order and accepted by him without examination. After having been fired off several times, it burst in consequence of a defect, which had been concealed by a plug, so that no one inspecting the gun would have discovered it. It was held that there was no defence, because the defendant had not been influenced in the acceptance of the gun by the artifice employed, and there was no affirmation of that which was not true to the knowledge of the party making it, nor any suppression of that which was true and which it was the duty of the party to make known.

(4) This provision is borrowed, as are other portions of the section, from the compilation, which, though never actually passed into law, is known as the New York Civil Code, § 757. It is a departure from English law, according to which a promise made with the intention of breaking it is not regarded as fraud (d). "It stands," say the Commissioners, "on the same footing with a purchase of goods with intent not to pay;" this sub-section will, no doubt, prove useful in avoiding transactions, in which, though

(a) Sugd. V. & P., 333.

(b) *Ib.*, 5.

(c) 31 L. J., Ex., 322. But see *per* Cockburn, C. J., in *Smith v. Hughes*, L. R., 6 Q. B., at p. 605.

(d) *Hemingway v. Hamilton*, 4 M. & W., 115.

no actual fraud has been committed, it is obvious that the intention is fraudulent, and that one party to the transaction is acting *malâ fide*.

(5) This sub-section seems to have been inserted on the principle enunciated by Lord Coke in *Twyne's case* (a). "Because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court, that all Statutes made against frauds should be liberally and beneficially expounded to suppress the fraud." No comment is made upon it in the New York Civil Code by the Commissioners; and it was probably inserted there as here, *ex abundanti cautela*, to catch any form of deceit for which the preceding sub-sections had not provided.

(6) By Section 24 of Statute 11 & 12 Vict., Cap. 21 (Insolvency), it is provided that if any insolvent, who shall file a petition for discharge under the Act, or who is adjudged to have committed an act of insolvency, shall voluntarily convey, assign, transfer, charge, deliver or make over any estate, money or other property whatever to any creditor, or any person in trust for a creditor, the conveyance, assignment, &c., if made when in insolvent circumstances, and within two months before the date of the petition of such insolvent or of the petition on which an adjudication of insolvency may have proceeded, or if made with a view to a petition of insolvency, or of committing an act of insolvency, shall be fraudulent and void as against his assignees.

(7) The distinction between active concealment and mere silence is thus broadly expressed by Lord Mansfield: "Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact and believing the contrary. But either party may be innocently silent as to grounds open to both to exercise their judgment upon" (b).

In general the parties to an agreement are supposed to be on an equal footing in understanding and experience, and each is supposed to trust to his own skill and judgment; mere silence,

(a) 2 Coke, Part III, 212; 1 Sm. L. C., 1.

(b) *Carter v. Boehm*, 3 Burr., 1905. See also judgment of Bramwell, B., in *Keates v. Cadogan*, 20 L. J., C. P., 76.

therefore, even on a matter likely to affect the other party's willingness to contract, does not amount to fraud.

"*Caveat emptor*" is the rule applicable to other agreements as well as those for sale, and if parties do not wish to bargain on those terms, it is always open to them to protect themselves by special stipulations. To this general rule there are two exceptions provided in the explanation, the first being in the case where it is the duty of the party keeping silence to speak, the second being where his silence is equivalent to speech: of the latter kind an illustration is given. The former exception is very widely expressed in the Explanation, and seems designed to include a far larger class of cases than that comprehended under Section 16. The duty to speak may arise from usage applicable to the transaction. Thus, where it was usual in particular sales to declare that the article was sea-damaged, the suppression of that fact was held to be fraudulent (*a*).

It is a general rule that where a matter is particularly within the knowledge of one party, he is bound to disclose it. Under such circumstances the parties cannot be on an equal footing, and therefore the rule of "*caveat emptor*" is inapplicable. When a debtor compounded with his creditor, knowing that he was under a false impression as to the value of his estate, but not disclosing the truth, the Court held that the creditor might avoid the composition and recover the debt in full (*b*). Agreements for marine insurance are necessarily made almost entirely upon the basis of the representations of the assured. It is his duty, therefore, to disclose everything material to the risk, and even an innocent concealment will make the policy voidable (*c*). The same obligation lies upon one who insures his property against fire; but in life-insurances it appears that no such duty is imposed by English law on the insuring party (*d*).

A misrepresentation made in innocent error becomes fraudulent, if the person who made it, upon discovery of its untruth fails to

(*a*) *Jones v. Bowden*, 4 Taunt., 846.

(*b*) *Vine v. Mitchell*, 1 Moo. & Rob., 337.

(*c*) *Carter v. Boehm*., 1 Sm. L. C., 555; *Stribley v. The Imperial Marine Insurance Company*, 1 Q. B. D., 507.

(*d*) *Lindenau v. Desborough*, 8 B. & C., 586.

inform the other party to the transaction, and allows him to remain in ignorance. "The case is not at all varied by the circumstance that the untrue representation, or any of the untrue representations, may, in the first instance, have been the result of innocent error. If, after the error has been discovered, the party who has innocently made the incorrect representation suffers the other party to continue in error and act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in the contemplation of this Court, a fraudulent misrepresentation" (a).

So, if one induces another to embark upon a transaction by representing that certain circumstances exist, and when to his knowledge those circumstances are subsequently altered before the liability has attached, it is his duty to inform that other; otherwise the latter is not bound (b).

There is no duty to disclose facts which occur or come to a person's knowledge after the contract is binding between the parties. Thus, where an assured, after the signing but before the execution of the policy, learnt facts material to the risk, it was held that he was not bound to communicate them to the underwriter (c).

A deed of gift may be valid and operative between the parties thereto, although in another suit between different parties it has been held to be fraudulent as against creditors. It was observed in the case referred to that it would be a serious question whether the donor could be allowed to avoid her own deed on the ground of her own fraud (d). In England the general rule of estoppel by deed does not extend to precluding a party from disputing the legality of an instrument though it is a deed: for instance, the obligor of an illegal bond can plead the illegality. But when an estate passes by the instrument and the party conveying is a party to the illegality, he cannot defend himself in an action of ejectment by pleading his own fraud in the execution of the

(a) *Reynell v. Sprye*, per Cranworth, L. J., 1 DeG. M. & G., 708.

(b) *Traill v. Baring*, 33 L. J., Ch., 521.

(c) *Cory v. Paton*, L. R., 7 Q. B., 304.

(d) *Ramanugra Narain v. Mahasandar Kunwar*, 12 B. L. R., 433. See *Tareeny Churn Bonnerjee v. Maitland*, 11 Moo. I. A., 317; *Shaw v. Jeffrey*, 13 Moo. P. C., 432; *Worthington v. Curtis*, 1 Ch. D., 419.

conveyance (a). However it has been held that a person who has made a disposition of his goods with the view of defeating his creditors may, if the illegal purpose remains unexecuted, recover his goods. He is not debarred by the mere intention to effect an illegal purpose, and it may be said that a man making such a disposition when embarrassed by debts is not *in pari delicto* with his grantee (b). It is clear that if the rule of estoppel by deed requires such modifications in England, it could not be applied more strictly here, and it has accordingly been observed that "justice, equity and good conscience require no more than that a party to such an instrument should be precluded from contradicting it to the prejudice of another person, when that other, or the person through whom the other person claims, has been induced to alter his position on the faith of the instrument" (c).

There are certain special duties as to disclosures to be made by principal and agent, by partners in dealing with each other, by a principal creditor in dealing with his surety : these will be dealt with under their several heads.

As to the capacity of a person who has obtained goods fraudulently to make a good title to an innocent purchaser, see *post*, Sec. 108, Exc. 3.]

"Misrepresentation" defined. 18. Misrepresentation means and includes—

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true (1);
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his

(a) *Doe d. Roberts v. Roberts*, 2 B. & A., 367.

(b) *Taylor v. Bowers*, 1 Q. B. D., 291 ; *Param Singh v. Lalji Mal*, I. L. R., 1 All., 403.

(c) See *Param Singh v. Lalji Mal*, I. L. R., 1 All., 410.

prejudice, or to the prejudice of any one claiming under him (2);

- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement (3).

[(1) This section deals with cases in which there has been no moral fault and no wish to deceive, but in which, from inadvertence or pure accident, the one party has misled the other. The first sub-section is placed by the framers of the New York Civil Code under the heading of fraud; and it would appear to be directed at those cases in which the English Courts have implied fraud from statements unwarranted by the information of the person making them, even though a dishonest intention was negatived.

As to (1) it must be noticed that the words "positive assertion," as contrasted with "the suggestion of a fact" in 17 (1), imply that there must, under this sub-section, be an absolute, explicit statement of the untrue fact, not merely such language as to lead the hearer to infer it. When a man is intentionally telling an untruth, its effect in rendering the contract voidable is the same, whether the untruth be directly expressed or indirectly suggested: but when a man, acting *bonâ fide*, unintentionally misleads another, nothing short of a positive assertion will be ground for avoidance. The words "by a party to the contract or with his connivance or by his agent" appear to have been inadvertently omitted, and are necessary to render the section rigidly accurate.

(2) This sub-section would appear to refer to cases in which there has been a failure to make some disclosure, or to ascertain and communicate some fact, or to comply with some formality or take some precaution, which was, from the nature of the transaction, obligatory on one party to the contract, and the result of the failure has been to gain an advantage to him and to cause disadvantage to the other party by misleading him to his prejudice, although the breach has been committed without any intention to deceive or to lead him into the contract. It might be held applicable to a case where a principal, by failing to make some com-

munication to his agent, gains an advantage over another through an innocent misstatement made by his agent. There can be no doubt that an agent's fraud makes the transaction voidable by the other party, although the principal is innocent of any complicity in the fraud (a.); but considerable discussion has arisen upon the cases, where neither principal nor agent has been guilty of fraud and yet the other party to the contract has been deceived by an untrue statement of the agent, which if made by the principal would have been fraudulent. In *Cornfoot v. Fowke* (b), the defendant refused to comply with an agreement to take a house on the ground that he had been defrauded by the plaintiff and others in collusion with him. The house had been represented by the plaintiff's agent as entirely unobjectionable, whereas it was in fact rendered uninhabitable by a neighbouring nuisance. This fact was known to the plaintiff, but not to the agent who made the representation, and the plaintiff was not aware of the representation having been made. A majority of the Court held the defence unavailing, because no fraud was brought home to the plaintiff. Lord Abinger however dissented, holding that the principal, though not bound by the representation of his agent, could not take advantage of a contract made under the false representation of his agent, whether the latter was authorized by him or not to make such representation. In a subsequent case the Queen's Bench adopted Lord Abinger's opinion, "that whether there was moral fraud or not, if the purchaser was actually deceived in his bargain, the law will relieve him from it. We think the principal and his agent are for this purpose completely identified, and that the question is, not what was passing in the mind of either, but whether the purchaser was in fact deceived by them or either of them" (c). The latter view has since predominated, and the decision in *Cornfoot v. Fowke* has been explained on the ground that it turned upon a point of pleading. Lord St. Leonards has in a later case (d) expressed as his opinion that, if he had to decide the case, he should have felt no hesitation in saying that, although the representation was not

(a) *Rawlins v. Wickham*, 1 Giff., 355; *Smith's case*, L. R., 2 Ch., 604

(b) 6 M. & W., 358.

(c) *Fuller v. Wilson*, 3 Q. B., 58.

(d) *National Exchange Co. v. Drew*, 2 Macq. H. L. C., 103.

fraudulent, the agent not knowing that it was false, yet that, as in fact it was false and false to the knowledge of the principal, it ought to vitiate the contract. It was admitted in that case that if a principal, with knowledge of a fact which was material to the value of the property, employed an agent whom he knew to be ignorant of that fact for the purpose of concealment, he could not avail himself of that concealment. But further, when a man knowing that a serious nuisance affects his house takes care not to make the contract himself, but leaves it to an agent whom he has no reason to suppose was aware of the fact, and the agent in the course of the negotiation makes a false statement with regard to such fact, it seems that the person deceived should be entitled to impeach the validity of the contract. It is not unreasonable to presume fraud from the circumstance of a man employing an agent under such circumstance and not informing him of a material fact.

In *Bulkley v. Wilford* (a) a solicitor being employed by the vendor of property, whose kinsman he was, to sell certain property, took a proceeding with reference to it which had the effect of revoking the vendor's disposition of it in his will. He did not tell the vendor of this effect, nor did he, in fact, himself know of it. It was held, however, to have been his duty to know, and that he could not be allowed to take advantage of his own breach of duty, so as to profit by the avoidance of the will. This sub-section provides for an analogous case in the matter of a contract. Again, there are various transactions, such as Marine and Fire Insurances, where the nature of the transaction throws on the party an especial obligation to speak and to speak accurately. Supposing, in such a case, that a default has been committed, but that the facts negative the idea of its having been committed with any view to influencing the contract, the present sub-section would appear to apply.

A grant of an annuity was made by the Commissioners for the reduction of the National Debt, to a Life Assurance Company on the life of C, who was certified by the Company to be of the age of sixty-four years. After the death of C in 1869, it was discovered that a misrepresentation of his age had been made by

(a) 2 Cl. & Fin., 102.

the Company. It was held that the Commissioners were entitled to have the contract declared void *ab initio*, although the misrepresentation was not intentional; and the money paid on both sides was ordered to be repaid with interest (a).

(3) It is difficult to conjecture to what class of cases this sub-section is intended to refer. On the one hand, if the parties have been in fact referring to different things, there has been no assent and there is no contract (Section 13), so that the sub-section would appear unnecessary. On the other hand, the words "causing a party to make a mistake as to the substance of the thing which is the subject of the agreement," must not be construed as interfering with the right preserved to contracting parties by the Explanation to Section 17, to keep silence as to facts likely to affect the willingness of the other person to contract, except where from particular circumstances it is a duty to speak.]

19. When consent to an agreement is caused by coercion, undue influence, fraud
Voidability of agreements without free consent. or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused (1).

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true (2).

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section seventeen, the contract, nevertheless, is not voidable, if the party whose consent was so caused, had the means of discovering the truth with ordinary diligence (3).

(a) *Attorney-General v. Ray*, L. R., 9 Ch., 397.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations.

(a.) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.

(b.) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.

(c.) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.

(d.) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e.) A is entitled to succeed to an estate at the death of B; B dies: C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

[(1) The last paragraph of the 14th Section explains what is meant by consent being "caused" by fraud. The wrongful act, whatever it be, must, it is submitted, be committed "by a party to the contract or with his connivance or by his agent," although those words are inserted in the 17th Section alone, and do not appear in the 15th, 16th or 18th. There might be some reason for their omission in the case of coercion and undue influence, but at any rate in the 18th Section, which relates to misrepresentation, they ought rightly to be inserted.

(2) A person, whose consent to an agreement has been obtained by coercion, undue influence, fraud or misrepresentation, has the following courses open to him—

(a.) He may avoid the agreement and sue for damages;

or, if necessary, sue to have it set aside and also claim damages ;

(b.) He may refuse to carry out the agreement and defend a suit brought against himself on it for damages or for specific performance ;

(c.) He may treat the agreement as valid and sue for specific performance, claiming also performance of the matter as to which misrepresentation has been made, or damages in respect thereof.

In the first two cases he elects to rescind the agreement, and must, therefore, restore any benefit he may have received under it, so far as he can (Section 64): and the result will be to replace the parties, so far as is possible, in the position they would have occupied if no such agreement had been entered into. As to the effects of fraud, the Court of Chancery has made a wide distinction between the cases where fraud is set up as ground for setting aside a contract, and those where it is used as a defence to a bill for specific performance, being satisfied in the latter case with evidence far short of that which would be required in the former. The Act does not notice this distinction, nor indeed does it, except incidentally, allude to specific performance. There is, however, no reason to suppose, that the equitable powers of the Courts are in any manner restrained, or that they are bound to give relief in the way of specific performance in all cases where the defendant fails to prove facts bringing his case within the four corners of the 15th, 16th, 17th, and 18th Sections. And now by the Specific Relief Act it is distinctly declared that a Court may exercise a discretion not to decree specific performances where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part, Sections 22—26. The second paragraph of this section merely gives one instance of circumstances under which specific performance may be claimed.

The Act is silent as to the conditions under which a person, at whose option a contract is voidable, may exercise such option ; and yet it can hardly be supposed that the Courts will avoid a contract, where there have been laches (a) on the part of him who

(a) *Muhammad Mohidin v. Ottayil Ummache*, 1 Mad. H. C., 390.

alleges that he has been defrauded, or where the interests of third parties would suffer by the avoidance.

Fraud is said to be waived by a person who, after discovery of it, insists on performance of the contract, or performs his part of it, or takes any benefit under it, or generally acts as if it were still a subsisting, valid contract. Thus, where a purchaser of shares found that the seller's representations were fraudulent, but still continued to deal with the shares as his own, he was held to be precluded from avoiding the sale, even though he subsequently discovered a new incident in the fraud (*a*). Again, where plaintiff undertook certain work at a certain price, and, after finding that the defendant had deceived him as to the amount of the work, still continued to do it till he finished it, it was held that he could only recover on the terms of the contract, because he had chosen to regard it as still subsisting (*b*).

The law is thus clearly laid down in a recent case. "In such cases the question is, has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? or has he elected to avoid it? or has he made no election? We think that so long as he has made no election, he retains the right to determine it either way, subject to this, that if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if in consequence of his delay the position even of the wrong-doer is affected, it will preclude him from exercising his right to rescind; and lapse of time without rescinding will furnish evidence that he has determined to affirm the contract" (*c*).

Fraud being established against a party, it is for him, if he allege laches in the other party, to show when the latter acquired a knowledge of the truth and prove that he knowingly forbore to assert his right (*d*).

The English cases seem reducible to this proposition, that the

(*a*) *Campbell v. Fleming*, 1 A. & E., 40; *Brigg's case*, L. R., 1 Eq., 483.

(*b*) *Selway v. Fogg*, 5 M. & W., 83.

(*c*) *Clough v. L. & N. W. R. Co.*, L. R., 7 Ex., at p. 35, per Mellor, J. So, as to delay in underwriters in repudiating a policy of insurance voidable for non-disclosure of a material fact, *Morrison v. Universal Marine Insurance Co.*, L. R., 8 Ex., 197.

(*d*) *Lindsay Petroleum Company v. Hurd*, L. R., 5 P. C. C., 221.

option to treat a contract as voidable cannot be exercised, if the rights of third parties would be thereby affected, or in any case unless there can be a "*restitutio in integrum*" (a). So, where a person has been induced by fraud to become a shareholder in a Company, he cannot, by repudiating the shares, evade his liability to creditors who dealt with the Company whilst he remained a shareholder (b). See note to Sections 64 and 108.

In the event of a person electing to treat the contract as valid he may sue for specific performance, and at the same time claim compensation for any loss which he suffers from the fraud or misrepresentation of the other party (Specific Relief Act, Section 19), or, if the misrepresentation is as to a matter over which the latter has any control, he can also be compelled to make his representation good. Thus, where a vendor purports to sell an estate in fee, and it turns out that he has only a limited interest, the purchaser can compel him to get in the reversion. Where one by means of untrue representations induces another to make a certain marriage, he is bound to make them good (c).

(3) It must be noted that this exception applies only where the consent has been obtained by misrepresentation or by silence deemed to be fraudulent. Whenever, therefore, there is any actual deceit or dishonesty, the fact that the party deceived had the means of discovering the truth will be immaterial, except indeed as evidence that the consent was not in reality caused by the deceit. Thus, where the seller of a public house made a false statement as to its profits, whereby the buyer was induced to buy, it was held that, though he had the means of informing himself of the real truth, he might avoid the contract (d).

It does not lie in the mouth of a person who has made a false statement to say that the person to whom it was addressed was not influenced by it in giving his consent, for the very object of making such a statement might be to throw dust in his eyes and to prevent him from prosecuting the other enquiries which might be open to him.

(a) *Western Bank of Scotland v. Addie*, L. R., 1 Sc. App., 145.

(b) *Henderson v. Royal British Bank*, 26 L. J., Q. B., 112.

(c) *Hammersley v. De Biel*, 12 Cl. & F., 45.

(d) *Dobell v. Stevens*, 3 B. & C., 623.

The distinction taken in this exception was made by Lord Chelmsford in a recent case (*a*).

The circumstance that the party, who alleges deceit, had the means of discovering the truth, and used them, is relevant to show that his consent was not caused by the deceit. If he relies on his own judgment, he may preclude himself from complaining of the untruth of a statement as having caused the contract. Thus, in a case in which misrepresentations were made about the value of a mine in which the plaintiff was about to take shares, but he himself visited it and examined into its condition, it was held that, not having relied on the misrepresentations, he could not avoid the contract (*b*). So again, an estate was put up for sale, described as in a ring-fence, and the intending purchaser visited it. He was held bound to complete the contract though the description was false (*c*). In these cases it was shown that the party was induced to enter the contract, not in consequence of the fraud, but in consequence of the information which he himself had the means of acquiring and did acquire. The same principle is recognized in the Act. See note to Section 116.]

Agreement void where both parties are under mistake as to matter of fact.

20. Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void (1).

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement, is not to be deemed a mistake as to a matter of fact (2).

Illustrations.

(*a*.) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the

(*a*) *Reynell v. Sprye*, 1 De G. M. & G., 708 ; *Smith v. Kay*, 7 H. L. C., 770 ; *Central Ry. Co. of Venezuela v. Kisch*, L. R., 2 H. L., 99.

(*b*) *Jennings v. Broughton*, 5 De G. M. & G., 126.

(*c*) *Dyer v. Hargrave*, 10 Ves. Jun., 505.

goods lost. Neither party was aware of these facts. The agreement is void.

(b.) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

(c.) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

[(1) In the cases given in the illustrations, the agreement is void because such an agreement presupposes the existence of the thing: its validity is conditional upon the existence of an assumed state of facts, and if that fails, the whole transaction falls to the ground. "There must," says Pothier, "be a thing sold which forms the subject of the contract. If, then, ignorant of the death of my horse I sell it, there is no sale, for want of a thing sold" (a). In *Strickland v. Turner*, the purchaser of an annuity dependent upon a life, was held entitled to recover back the price paid, upon its being ascertained that the life had already expired at the date of the agreement (b). So, where a policy of insurance was renewed by parties who were ignorant that the insured had already died, it was held that the renewal was void (c). Besides the cases of this character, there may be error as to the object-matter of the agreement or its necessary qualities, which, if both parties labored under it, would invalidate the agreement.

The error of the first sort, namely, as to the identity of the object-matter, has been dealt with in the note to Section 18. It excludes all notion of agreement, for unless the minds of the parties are directed to the same object, the existence of consent is impossible. A mere mistake in the name is immaterial, if the parties are agreed as to the thing, and when the mistake relates to the properties of a thing, a distinction must be observed between those properties by which the thing is designated as belonging to a known kind, and other properties which may be absent without making an essential difference. In the cases cited in the note to Section 113, the question was whether the thing tendered in performance of the agreement corresponded in kind to that which was

(a) *Contrat de Vente*, No. 4; *Hastie v. Couturier*, 9 Ex., 102.

(b) 7 Ex., 208.

(c) *Pritchard v. Merchant's Life Assurance Society*, 27 L. J., C. P., 169.

bargained for, or whether the difference was merely in quality : the difference being in kind, the transaction was void, because the parties were not at one as to the essential properties of the object-matter of the agreement. Thus, in *Thornton v. Kempster* (a), the sale was of ten tons of sound merchantable hemp, but it was intended by the vendor to sell St. Petersburg hemp and by the buyer to purchase Riga hemp. The broker had made a mistake in describing the hemp to the buyer, and the Court held that there was no contract.

Where the actual extent of an estate sold is considerably greater or less than what it is stated or supposed to be, the sale is set aside. In *Price v. North* (b), the estate was described as measuring 14 acres more or less, but it appeared that the acres were customary acres and equal to 27 statute acres, it was considered that this was ground, not for modifying the contract, but for avoiding it altogether. On the same principle a sale has been held invalid where leasehold was described as freehold ; there was no fraud, but the purchaser had not got substantially what he bargained for.

As to mistake of person, see note to Section 13.

So, an agreement to purchase shares, made in the ignorance of both parties that a petition for winding up the Company had been presented, was held not enforceable against the purchaser (c).

A distinction must be made between mistake in the intention or purpose of the parties, and a mistake in rendering their intention into words.

An agreement is not void if the mistake is one for which a remedy may be obtained by the reformation of a document. In such cases there is an agreement, but the words in which it is expressed do not rightly represent the meaning of the parties (d). On the other hand, when the mistake consists in using a form of words, which has the effect of creating an obligation which it was not the intention of the parties to create at all, a plea of mistake would be a complete answer to an action. In *Wake v. Harrop* (e) the defend-

(a) 5 Taunt., 786.

(b) 2 Y. & C., 620.

(c) Emmerson's case, L. R., 1 Ch. App., 433.

(d) *Druiff v. Parker*, L. R., 5 Eq., 131 ; *Mackenzie v. Coulson*, L. R. 8 Eq., 368.

(e) 30 L. J., Ex., 273 ; *Bullen & Leake's Pleadings*, p. 569.

ant pleaded that it was intended that he should sign as agent and that it was by mistake that he had bound himself personally. The Court held that this was a good equitable plea, because, under such circumstances, equity would discharge him unconditionally from the contract.

(2) The supposed value of the thing may be a motive inducing the agreement, but it can scarcely be a matter essential to it. The distinction, which is often rather fine, is the same as that which is drawn between the specific character and the quality of a thing sold. The distinction is well illustrated in *Barr v. Gibson* (a), where the defendant covenanted that he had power to sell a ship which, as it appeared afterwards, had been wrecked at the time of the sale. The Court held that, if the ship had ceased to exist as a ship, there was a breach of the covenant; but if it still existed as such, however damaged, there was no breach, as the covenant imported no obligation with regard to its condition.

Oral evidence is admissible to show that a written agreement was made under a mistake. See Section 92, Proviso (1) of the Indian Evidence Act.]

21. A contract is not voidable because it was caused by a mistake as to any law in force in British India (1); but a mistake as to a law not in force in British India has the same effect as a mistake of fact (2).

Effect of mistakes as to law.

Illustrations.

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation: the contract is not voidable.

A and B make a contract grounded on an erroneous belief as to the law regulating bills of exchange in France: the contract is voidable.

[(1) This accords with the English common law rule, that ignorance of law cannot be pleaded. Money paid by a man who is apprised of the circumstances, but ignorant that they afford

(a) 3 M. & W., 390.

him a legal defence is, therefore, not recoverable (a). "The Court," said Chancellor Kent, "do not undertake to relieve parties from their acts and deeds fairly done, though under a mistake of law. Every man is to be charged at his peril with a knowledge of the law. There is no other principle which is safe and practicable in the common intercourse of mankind" (b).

The principle has been applied to the case of a legatee dissatisfied with the construction put by the executor on the will and claiming repayment from another legatee, to whom money has been paid over by the executor, alleging that the will has been wrongly construed. "It would open," said James, L. J., "a fearful amount of litigation and evil in the cases of distribution of estates, and it would be difficult to say what limit could be placed to this kind of claim, if it could be made after an executor or trustee had distributed the whole estate among the persons supposed to be entitled, everyone of them having knowledge of all the facts, and having given a release" (c). At the same time Courts of Equity have claimed power to relieve against mistakes in law as well as against mistakes in fact, in cases where there is an equitable ground which makes it inequitable that the party who has received the money for other property should retain it; for instance, in cases where there is a fiduciary relation between the parties, or where there is any ground for suspecting that any undue advantage has been taken of the person's ignorance. The opinion has been strongly expressed that a fraudulent representation as to the effect of a deed may be used in defence to an action on the deed (d).

A distinction has been also drawn between mistake of general law and mistake in construction of a document, upon which Lord Chelmsford has observed as follows: "With regard to the objection, that the mistake (if any) was one of law, and that the rule "*Ignorantia juris neminem excusat*" applies, I would observe upon the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from

(a) *Bilbie v. Lumley*, 2 East, 469.

(b) Cited in *Stor. Eq. Jur.*, note to § 126.

(c) *Rogers v. Ingham*, 3 Ch. D., 351, at p. 356.

(d) *Hirschfield v. L. B. S. C. Ry. Co.*, 2 Q. B. D., 1.

the ignorance of a well known rule of law. And there are many cases to be found in which equity, upon a mere mistake of the law without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake" (a).

In *Cooper v. Phibbs* (b), the parties had all along dealt with a certain fishery, as if it belonged to the petitioner's uncle, and therefore, on his death, descended to his daughters. The petitioner, being under this misapprehension and ignorant that he himself was in fact tenant for life, agreed to take it on rent from his uncle's daughters. Afterwards he discovered that the fishery really belonged to himself and accordingly prayed that the agreement might be ordered to be delivered up. In the course of the judgment, Lord Westbury said, "It is said '*Ignorantia juris haud excusat*;' but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand."

In cases of this kind, where a person deals as owner, with property which not only does not belong to him but actually belongs to the other party, the error is such that the transaction is wholly void—there is an entire absence of consideration, and it would seem to be immaterial that the error arose from ignorance of law (c).

(2) Foreign law is regarded as a matter of fact and is

(a) *Beauchamp v. Winn*, L. R., 6 H. L., 223.

(b) L. R., 2 H. L., 149. This case was followed in *Jones v. Clifford*, 3 Ch. D., 779.

(c) *Bingham v. Bingham*, 1 Ves. Sen., 126.

accordingly proved in the same way. See Section 38 of the Indian Evidence Act.]

Contract not voidable merely because of mistake of one party as to matter of fact.

22. A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

[Where the terms of the agreement or the expressed intention of the parties unmistakeably denote one object, it is not open to either party to say that he intended something different. If the one party was aware that the other was labouring under a mistake, and did not relieve him, there may be a question of fraud or of a breach of duty to make a communication; but otherwise everybody is bound by his expressed intention. Were this not so, it would always be in the power of a party to a contract to evade it by alleging a mistake. So, if a buyer supposes that an article will answer a certain purpose for which it turns out unavailable, or that it possesses some special value, he is not in a position to say that his apparent consent to the bargain was not real (a).

A mistake of the vendor in exhibiting a wrong sample does not render the contract voidable by him, because his acts preclude him from saying that he entered into it in a different sense from that in which it was understood by the purchaser (b); but if the latter had been aware that the vendor was under a misapprehension, then the contract might have been voidable (c).

Mistake in the motive which induces a person to enter into a contract is no ground for avoiding it. Where the defendants, thinking that the arrangements for amalgamating their Company with another were complete, gave plaintiff a bill of exchange in payment of a debt owed by the latter Company, it was held to be no defence to an action on the bill, that the defendants gave it under a mistake, the supposed amalgamation turning out abortive (d) (see cases cited in note to Section 72).

(a) *Chanter v. Hopkins*, 4 M. & W., 399.

(b) *Scott v. Littledale*, 27 L. J., Q. B., 201.

(c) *Smith v. Hughes*, L. R., 6 Q. B., 597 at p. 610.

(d) *Balfour v. The Sea, Fire and Life Assurance Company*, 27 L. J., C. P., 17.

As in cases where fraud is alleged, the Court of Chancery makes a distinction between the grounds for setting aside an agreement and those for refusing to decree specific performance. Thus, specific performance was refused against a purchaser of a lot at an auction, who had by mistake bid for a lot which he had not intended to buy (a).]

What considerations & objects are lawful and what not.

23. The consideration or object (1) of an agreement is lawful, unless—

it is forbidden by law (2); or

is of such a nature that, if permitted, it would defeat the provisions of any law (3); or

is fraudulent (4); or

involves or implies injury to the person or property of another (5); or

the Court regards it as immoral or opposed to public policy (6).

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void.

Illustrations.

(a.) A agrees to sell his house to B for 10,000 rupees. Here, B's promise to pay the sum of 10,000 rupees is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the 10,000 rupees. These are lawful considerations.

(b.) A promises to pay B 1,000 rupees at the end of six months, if C, who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here, the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c.) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage.

(a) *Malins v. Freeman*, 2 Keen, 25.

Here, A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.

(d.) A promises to maintain B's child, and B promises to pay A 1,000 rupees yearly for the purpose. Here, the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e.) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f.) A promises to obtain for B an employment in the public service, and B promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g.) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A on his principal.

(h.) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i.) A's estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.

(j.) A, who is B's mukhtár, promises to exercise his influence, as such, with B in favor of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(k.) A agrees to let her daughter to hire to B for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

[(1) The object of an agreement is the thing promised. Thus, if A agrees to sell his house, the object of the agreement is the sale of the house. If A agrees to marry B, the object of the agreement is the marriage of A to B.

"Object" and "consideration" are different names for the same thing viewed from the different points of view of the parties: that which, as regards one party, is the object of the contract, is, as regards the other party, its consideration. If either of these is unlawful, the contract is void. The

same rule is laid down in a somewhat amplified form in the next succeeding section. Even a partial illegality in either consideration or object will invalidate the entire contract. The only exceptions are those provided in Sections 57 and 58, where there are two sets of promises, one legal and the other illegal; or where there is an alternative promise, one branch of which is legal and the other illegal; in these cases the partially illegal character of the contract does not prevent its legal portion from being enforced. In the cases mentioned in Sections 27 and 28, the contract is declared void only "to that extent," and, therefore, in any contract which falls within those sections, if the illegal portion can be got rid of, the legal portion may be enforced. This rule follows the English cases upon the subject.

It would appear to be the right, and even the duty, of a Court to notice any illegality of consideration, if apparent on the face of the proceedings, whether urged by the parties or not. "It may be admitted," observed their Lordships, in *Fischer v. Kamala Naicker* (a), "that the Court would have the right, perhaps even lay under an obligation, to take cognizance, *motu proprio*, of any objection, manifestly apparent on the face of the proceeding, which showed that it was against morality or "public policy."

(2) Sections 26 and 30 are specimens of contracts forbidden by law. See also 33 & 34 Vict., c. 90 (Illegal Shipbuilding), Act XXI of 1856, Act I of 1866 (Madras), sales of spirits in cantonments, &c. The law does not, for the most part, forbid things in express language, but imposes penalties for doing them; the imposition of such a penalty is deemed to imply a prohibition, and an agreement to do a thing, so impliedly prohibited, would be unlawful (b).

(3) An example of (3) is given in Illustration (i). The law will not enforce agreements, the very object of which is to render its own enactments nugatory. Thus, in the numerous cases in which particular persons, officials and others, are forbidden to purchase at particular sales, an agreement

(a) 8 M. I. A., 187.

(b) *Forster v. Taylor*, 5 B. & A., 887.

made for the purpose of enabling such a person to become a purchaser, would be void. In a recent case (a) it was held that a contract to give a boy in adoption in consideration of an annual allowance being made to his natural parents was held void, partly on the ground of its being calculated to defeat the provisions of the Hindu law, and partly on the ground of its being injurious to the boy himself.

It is contrary to the policy of the law to allow persons, by a contract between themselves, to avoid a marriage on the happening of any event they may think fit to fix upon; therefore, a suit brought on a contract entered into by Hindus living in Assam, by which it was agreed that upon a certain event happening the marriage was to become null and void, was declared not to be maintainable (b).

The plaintiff paid fifty rupees to the defendants on the condition that they should procure the release of her husband from jail, and in an action for breach of contract it was decided that the plaintiff could not recover, as the contract was illegal and immoral (c).

"A contract providing for the collection and payment over to the zemindar of the proceeds of such [illegal] a cess appears to us to fall within the rule stated by Chief Justice Holt in *Barlett v. Vinor* (d), viz., 'every contract made for or about any matter or thing which is prohibited and made unlawful by Statute, is a void contract' " (e).

(4) Thus, when the plaintiff had contracted with the Government to keep certain horses for the army, and the defendant had contracted with the Government to supply them with forage, and the defendant agreed, in consideration of the plaintiff not drawing the forage, to allow plaintiff so much for each ration of forage not drawn; the agreement was held void as being a fraud upon Government (f). The plaintiff being desirous of forming a Company

(a) *Eshan Kishor Acharjee Chowdhry v. Haris Chandra Chowdhry*, 13 B. L. R., App., 42.

(b) *Sitaram v. Mussamut Aheeree Heerahnee*, 11 B. L. R., 129.

(c) *Protima Aurat v. Dukhia Sirkar*, 9 B. L. R., Appx., 58.

(d) *Carthew*, 252.

(e) *Kamala Kant Ghose v. Kalu Mahomed Mandal*, 3 B. L. R., A. C., 44, *per* Norman, J.

(f) *Willis v. Baldwin*, 2 Dougl., 450.

for the working of a certain process, bought of the defendants the exclusive right to use the process, knowing at the same time that the defendants did not possess the exclusive right, but thinking to induce persons to take shares in the Company under the belief that such exclusive right was transferred to him. The circumstance of the contract between plaintiff and defendants being entered into in contemplation of a fraud on the intended shareholders, was held to be one ground for dismissing the suit brought to recover the purchase-money as money paid for a consideration which had failed (a).

(5) Thus, a tradesman cannot recover the price of libellous publications sold by him: nor a printer the price of printing a libellous work (b): nor can an agreement to indemnify a publisher for any damages incurred by him owing to the publication of a libellous work, be enforced. Another instance is afforded by a case in which a clerk made an agreement with his employer's brokers to receive a percentage of the brokerage earned on transactions carried out for his employer, as a consideration for inducing his master to employ the brokers (c).

A promise to indemnify plaintiff in consideration of his having published a libel and defended an action brought against him for it at defendant's request, is void (d).

(6) This part of the section is so worded as to give the Courts considerable latitude in refusing to recognize any contract which they consider in its character or tendency calculated to injure the public interests.

Illustration (f) points to one highly important class of agreements void on the ground of public policy, those, namely, which involve a traffic in public offices. Thus, a promise by defendant, in consideration of £5,000, to procure the command of a ship in the East India Company's Service for another, and to repay the £5,000 when any other person should be appointed, was held void, so that an action would not lie against the defend-

(a) *Begbie v. Phosphate, etc., Co. Limited*, 1 Q. B. D., 679.

(b) *Poplett v. Stockdale*, 1 Ry. & M., 337.

(c) *V. Gunpatrav v. R. Pranjevandas*, 7 Bom. (O. C.), 91.

(d) *Shackell v. Rosier*, 2 Bing., N. C., 634.

ant for the repayment of the £5,000 (*a*). So, agreements to resign public offices, and promises made in consideration of such resignations, have been held to be void. So, also, where the plaintiff held an office in the dock-yard, and the agreement was that, in consideration of the plaintiff allowing himself to be superannuated, the defendant would, if he succeeded the plaintiff, pay him a share of the annual profits of the office (*b*). Sale and brokerage of public offices is forbidden by 49 Geo. III, c.126, § 3, a Statute which is in force in the Presidency-towns.

Another class of agreements, void on the ground of public policy, are those which are made with a foreign enemy, except with the license of the Crown. So, also, is an agreement made by an agent on account of a foreign enemy, so that the agent cannot recover on it, though the contract be in his own name (*c*); and British subjects or neutrals, voluntarily residing in a hostile country, are, as regards contracts made with them, in the position of alien enemies, and therefore contracts made with them will be illegal (*d*). But it appears that a prisoner of war can both sue for services rendered by him while a prisoner, and can be sued on his acceptance given while a prisoner (*e*). A contract of insurance of a foreign ship or goods against British capture is illegal, and such capture is always impliedly excepted from any such policy. A contract, originally good, may become void by a declaration of war rendering its completion illegal. Thus, a charter-party to load a cargo at a foreign port was, after a declaration of war, held to be discharged, inasmuch as the charterer could not provide the cargo without trading with the enemy (*f*). If there is the license of the Crown, *e. g.*, an order in Council allowing trade to certain places or for a certain time, any contract which fell within the terms of the license would be, of course, enforceable (*g*).

(*a*) *Blachford v. Preston*, 8 T. R., 89.

(*b*) *Parsons v. Thompson*, 1 Black., H., 322.

(*c*) *Brandon v. Nesbitt*, 6 T. R., 23.

(*d*) *Willison v. Patteson*, 7 Taunt., 439.

(*e*) *Sparenburgh v. Bannatyne*, 1 B. & P., 163; *Antoine v. Morehead*, 6 Taunt., 236.

(*f*) *Esposito v. Bowden*, 24 L. J., Q. B., 210. As to a justification of refusal to perform a contract owing to restraint of princes, *Geipel v. Smith*, L. R., 7 Q. B., 404.

(*g*) *Clementson v. Blessig*, 11 Ex., 135.



Illustrations (*j*) and (*k*) give instances of agreements which the law considers immoral: (*g*) is an agreement involving conduct on the mukhtar's part which is inconsistent with the duty which he owes to his employer, and is therefore dis-
countenanced by the law.

In the same way the law disfavors social immorality, concubinage, &c. The thing in itself may not be an offence, but the law, though tolerating it, refuses to lend its aid in enforcing agreements in which it forms an ingredient (*a*). A contract of sale or hiring of things to be used in a brothel or by a prostitute for purposes incidental to her profession is void; and the price of the things or the sum agreed to be paid on account of hire cannot be recovered (*b*). The principles which govern the English cases are applicable to this country, and, accordingly, a landlord cannot recover the rent of lodgings knowingly let to a prostitute (*c*). Illustration (*k*) states the case of an agreement for concubinage, and in English law bonds given to induce the obligee to live in illicit cohabitation are likewise void. On the other hand, the consideration of past cohabitation and previous seduction does not make a bond, which being under seal requires in English law no consideration, void: such consideration is not held good so as to support a promise not under seal, but it is not held illegal. On the same principle, a bond to provide for the future separation of husband and wife, or made in contemplation of a breach of conjugal fidelity, is illegal, it being both immoral and opposed to public policy that married persons should contemplate such arrangements.

When, however, the separation has actually occurred, it is not illegal for a husband and wife to provide by deed for their rights and liabilities during the separation (*d*); and the Courts will enforce performance of an agreement to execute such a deed, or of the covenants contained in it (*e*). A covenant on the husband's part not to sue for restitution of conjugal rights is usual in

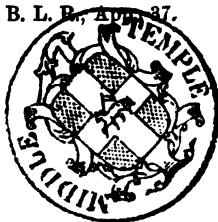
(*a*) *Brown v. Brine*, 1 Ex. D., 5; *Collins v. Blantern*, 1 Smith's L. C., 325.

(*b*) *Hamilton v. Grainger*, 5 H. & N., 40; *Pearce v. Brooks*, L. R., 1 Ex., 213.

(*c*) *Gaurinath Mookerjee v. Madhumani Peshakar*, 9 B. L. R., App. 27.

(*d*) *Randle v. Gould*, 27 L. J., Q. B., 57.

(*e*) *Sanders v. Rodway*, 22 L. J., Ch., 230.



such deeds, and will be enforced in equity by injunction (a) though not, it appears, in the Divorce Court (b).

There are some agreements which, though not actually immoral, are regarded by the law as of an immoral tendency, and are, on this ground, discountenanced. Thus, agreements to procure the marriage of another person are treated as unlawful by the English Courts, and a bond, in which the obligor bound himself to pay £500 within three months after his marriage to a particular lady, being made for the purpose of procuring the marriage, was held to be void (c).

An agreement by one person not to bid against another at an auction is not illegal (d).

Agreements for the sale of goods for the purpose of smuggling them out of British territory are void, and the price of goods so sold cannot be recovered (e). But this rule does not, according to English law, apply to a contract made in a foreign country for the sale of goods prohibited in British territory, if the delivery is complete abroad, although the seller knows that they are to be smuggled into British territory (f), and an action might be brought for the price of such goods. The case is otherwise if the seller is to deliver them in British territory, or if they are to be paid for only if the vendee succeeds in landing them.

Nor can the vendor of goods abroad, who has packed them in a particular manner by order of the buyer, for the purpose of smuggling them into British territory, and who knew at the time that they were to be so smuggled, recover their value, though he took no share in the actual importation (g).

On the same ground the compromise of offences is, as a general rule, forbidden. Sections 213 and 214 of the Indian Penal Code make it a punishable offence to accept or ask for, give or agree to give, any gratification in consideration of concealing an

(a) *Hunt v. Hunt*, 31 L. J., Ch., 161.

(b) *Mortimer v. Mortimer*, 2 Hag. g., Cons., 318.

(c) *Hall v. Potter*, 3 Lev., 411.

(d) *In re Carew's Estate*, 26 Beav., 187; *Galton v. Emuss*, 1 Col., 243; Sugd., V. & P., 11.

(e) *Biggs v. Lawrence*, 3 T. R., 454.

(f) *Holman v. Johnson*, 1 Cowp., 341.

(g) *Waymell v. Reed*, 5 T. R., 599.

offence, or of screening any person from legal punishment, or of not proceeding against any person for the purpose of bringing him to justice. There is an exception, however, in favor of cases in which the offence consists only of an act, irrespective of the intention of the offender, and for which the person injured may bring a civil action. The "intention" here referred to is clearly, not the intention which is a necessary ingredient of every offence (I. P. C., Sec. 80), but that special intention, which is specified in so many sections of the Code as forming a necessary ingredient, or entailing an additional punishment, in particular offences. Where, therefore, an act is an offence, irrespective of any such special intention on the part of the person doing it, and when the same act can be made the subject of a civil suit, the party injured is at liberty to compromise it. Assault and adultery are the instances given in the Code of offences which may be compromised. Bigamy cannot, because it is not the subject of a civil suit; nor, it appears, could mischief (Sec. 425) be compromised, because a special intent is specified in its definition as a necessary ingredient of the offence. The question of compounding offences was fully considered in the late case of *Reg v. Rahmat (a)*, and West, J., construed the words in the exception to Section 214, "may bring a civil action" as meaning "may bring an action without, or instead of, instituting criminal proceedings." He was of opinion that whenever the words 'voluntarily,' 'intentionally,' 'fraudulently,' 'dishonestly' or others whose definition involves a particular intention, enter along with a specified act into the description of an offence, the offence, not being one "irrespective of the intention," is not one which the exception to Section 214 by itself allows to be compounded. . . . The offence, to admit of compromise, must be one in this sense irrespective of the intention, and it must be one for which a civil action may be brought at the option of the person injured, instead of criminal proceedings." The compromise of a suit for dissolution of marriage in consideration of the co-respondent paying the petitioner a sum of money, is considered in England contrary to public policy; the Court of Chancery will not grant specific performance of such an agree-

(a) I. L. R., 1 Bom., 147, at pp. 152, 154.

ment, and a bond given in consideration of giving up and abandoning a petition for divorce cannot be enforced by the obligee (a).

Another class of agreements held void on the ground of public policy are those by which a person agrees to maintain a suit in which he has no interest, a proceeding known to English law as maintenance, and those in which a person bargains for a share of the result to be ultimately decreed in a suit in consideration of assisting in its maintenance, which is styled champerty. Both of these proceedings are offences at Common Law, and agreements in which they form a part are illegal. Thus, in England, the assignment by a sailor of part of his prize-money, pending the prize-suit, to his prize agents, in consideration of their carrying on the suit, and indemnifying him against the costs and charges thereof, was considered void (b). On the same ground, any arrangement, by which an attorney agrees with his client to be paid by a share of whatever is recovered in the action, is illegal (c). So, also, an agreement that defendant should institute proceedings for the recovery of certain property, and that the plaintiff should supply him with evidence sufficient to enable him to recover, and that plaintiff should, in consideration thereof, enjoy a share of the property recovered, is illegal (d). On the other hand, an agreement between several persons to combine in resisting actions brought against each of them, founded on claims of a like nature, is not illegal; nor is an agreement enabling the purchaser of an estate to use the vendor's name in suing for injuries done to it previous to the sale (e). Likewise, an agreement by an attorney with a client "to charge nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in such an action," was held not to be champertous (f).

The qualities attributed to champerty or maintenance by English law must, in the opinion of the Judicial Committee,

(a) *Gipps v. Hume*, 31 L. J., Ch., 37; 2 John. & H., 517.

(b) *Stevens v. Bagwell*, 15 Ves., 139.

(c) *Earle v. Hopwood*, 30 L. J., C. P., 217.

(d) *Sprye v. Porter*, 26 L. J., Q. B., 64; 7 Ell. & B., 58.

(e) *Williams v. Protheroe*, 5 Bing., 309.

(f) *Jennings v. Johnson*, L. R., 8 C. P., 425.

characterize the same matter in this country. There "must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary" (a). But the specific English law of maintenance and champerty has not been introduced into India (b). The opinions expressed, that the English Statute and Common Law relating to champerty and maintenance prevail in the Presidency-towns (c), must now be considered erroneous. What the Courts have here to do is to apply the broad principles of equity and good conscience, and to consider whether a transaction impeached on the ground of maintenance is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up merely for the purpose of spoil or litigation (d). A fair agreement to supply funds to carry on a suit in consideration of having a share of the property if recovered ought not to be regarded as being *per se* opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party, or to be not with the *bonâ fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, or for the purpose of gambling in litigation or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them.

Mere relationship and a collateral interest in the property in suit does not justify champerty. Thus, when the plaintiff was

(a) *Fischer v. Kamala Naicker*, 8 Moo. I. A., 170.

(b) *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, I. L. R. 2 Cal., 233; *Mulla Jaffarji Tyeb Ali v. Yacali Kâdar Bî*, 7 Mad. H. C., 128.

(c) *Grose v. Amirtamayi Dasi*, 4 B. L. R., O. J., 1; *Ram Coomar Coondoo v. Chunder Canto Mookerjee*, I. L. R., 2 Cal., at p. 251.

(d) *Chedambara Chetty v. Renja K. M. V. Puchanja Naiker*, 13 B. L. R., 509; L. R., S. C., 1 I. A., 241.

heir at law and one of the next-of-kin of the defendant, and A, who was defendant's brother and plaintiff's cousin, had made a will leaving his property to persons other than plaintiff and defendant, and, as plaintiff believed, revoking a former will by which he had left property to the plaintiff, and, in consideration of plaintiff's taking the necessary steps to contest the will, defendant promised to share with plaintiff half the property which might come to him by reason of the suit,—it was held that the fact of the plaintiff being a relation of the defendant and having a collateral interest in the matter in dispute did not save the agreement to give defendant half of what was recovered from being champerty (a).

But a *bona fide* belief, although erroneous, that the party aiding in the suit has a common interest in the result of the suit, will save an agreement from being champerty (b).

Contracts restricting persons in their ordinary dealings with property are void on the ground of public policy, unless the restriction is for the benefit of the parties (c). Thus, a covenant not to sell land or not to use it in a particular way is generally void; but a covenant between neighbouring landowners not to build on a certain piece of land may be valid, because it may be for the advantage of both proprietors (d). A covenant of this character may be enforced against all persons who take with notice of it (e).

An agreement to withdraw opposition to a railway bill for a pecuniary or other consideration, is not illegal (f). So also an agreement, the result of which is to create a monopoly and deprive the public of the benefit of competition, is not necessarily illegal.

A stipulation made in a bond that the obligee may treat as a nullity any payment not indorsed in writing on the bond is void. It is against the policy of the law and against good con-

(a) *Hutley v. Hutley*, L. R., 8 Q. B., 113

(b) *Findon v. Parker*, 11 M. & W., 675.

(c) *Brandon v. Robinson*, 18 Ves., 429.

(d) *McLean v. McKay*, L. R., 5 P. C., 327.

(e) *Tulk v. Moxhay*, 2 Phill., 774.

(f) *Shrewsbury and Birmingham Railway v. London and North-Western Railway Company*, 21 L. J., Q. B., 89; 17 Q. B. Rep., 652.

science, because it would enable the obligee to take advantage of his own negligence. The Court will therefore, notwithstanding such a condition, admit oral evidence of payment (a).

When an insolvent enters into a composition with several creditors and at the same time makes a private arrangement with one of the creditors, by which such creditor gets an advantage over the other creditors, as, for instance, a better proportion of his debt or a better security for payment, the latter agreement is void as being fraudulent. Each creditor in such a case is held to consent to lose a proportionate part of his debt, and any attempt to alter this proportion is a fraud upon the rest (b). An agreement, therefore, in any such case, either to pay a creditor in full or at a higher rate than the others, or to give him collateral security, cannot be enforced. It is not competent for a party giving a consideration for a contract that is a direct fraud upon the bankruptcy law, to have the benefit of it. "That is to say, as I understand it, a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the Bankruptcy laws" (c).

But when there is no general arrangement with the creditors, an agreement which has the object and the effect of giving one creditor a preference over others, or of defeating legal execution, is not necessarily void (d). A creditor is entitled to set aside a transfer by his debtor, only if he can show that it was merely a fictitious contrivance to deceive, and not a genuine transaction, or that it was voluntary and made with the intention of defeating creditors (e).

A deed of sale, conveying real estate, the property of a defendant in a suit then pending in the Supreme Court at Bombay,

(a) *Sashachellum Chetty v. T. Govindappa*, 5 Mad. H. C., 451; *Naráyan U. Pátíl v. Motilál Ramdás*, 1 L. R., 1 Bom., 45.

(b) *Mallalieu v. Hodgson*, 20 L. J., Q. B., 339; *Blacklock v. Dobie*, 1 C. P. D., 265.

(c) *Ex parte Mackay*, L. R., 8 Ch., 643, *per* Mellish, L. J.; *Ex parte Williams*, 7 Ch. D., 138.

(d) *V. Sankarappa v. D. Kamayya*, 3 Mad. H. C., 231; *In re Dhanjibhai Kharsetji*, 10 Bom. H. C., 266.

(e) *Gnánabhái v. C. Srinívása Pillai*, 4 Mad. H. C., 84.

was held, in the absence of satisfactory evidence of a *bonâ fide* consideration having been paid by the vendee, to be fraudulent and void as against the creditors of the vendor, and to have been executed for the purpose of defeating a sequestration (a).

It is sometimes difficult to decide whether an agreement, which follows and supersedes a partly-performed illegal agreement, is itself also infected with illegality. In *Joseph v. Solano* (b) the facts were these: the defendant owed the plaintiff various legal debts and also some contracted in the execution of an illegal purpose; the defendant mortgaged his horses to the plaintiff by way of security for these debts, and the plaintiff being about to sell the horses, the defendant, in consideration of the plaintiff's withdrawing the advertisement of sale, agreed to admit the correctness of a balance of 7,000 rupees, and gave promissory notes for the amount. On this, Macpherson, J., held that the promissory notes, being for a consideration that was partly bad, were wholly void: Markby, J., held that the promissory notes were wholly good, the second contract not springing from or being the creature of the first, and accordingly not tainted with its illegality; and Couch, C. J., held that the promissory notes were illegal so far as they covered claims shown to be illegal, but that the plaintiff might be allowed to amend his plaint and to recover from the defendant so much as was legally due.

In *Bubb v. Yelverton* (c) it was contended that the bond was void as having been given for payment of Lord Hastings' racing debts: this was met by the answer that the consideration of the bond was the abandonment by Lord Hastings' racing creditors of proceedings against him before the Jockey Club: the bond was given by Lord Hastings, "not to pay racing debts, but to avoid the consequences of not having paid them," viz., the action of the Jockey Club against him as a defaulter.

An agreement not to enforce an agreement, void for illegality, is itself illegal. The original illegality taints the second agreement.

(a) *Musadee Mahomed Cazum Sherazee v. Meerza Ally Mahomed Shoostry, &c.*, 6 M. I. A., 27.

(b) 9 B. L. R., O. C., 441.

(c) 9 L. R., Eq., 471.

So, also, if a bill, given originally on illegal consideration, be renewed, the renewed bill is void, unless the amount be reduced by excluding so much of the amount of the original bill as was for an illegal consideration.

An agent who has sold goods for his principal and received the price is bound to pay over the amount to his principal, though the contract for sale is illegal and void (*a*). And where two persons joined in an illegal wager and the whole amount was paid to one of them, the other was held entitled to recover his share from him (*b*). See note to section 30.

The principle upon which these and other cases seem to rest is the distinction between enforcing illegal contracts and upholding claims to money which arise independently of them. If the illegal transaction is completed and closed, still more if the Court can proceed without investigating the origin of the demand, the rights asserted will be recognized; but if the form of the transaction makes it necessary to go into the dealings of the parties and they are illegal, the Court will not proceed (*c*).

The former of these cases is perhaps more in accordance with "the principle of justice" on which they have been rested, than in strict conformity to the rule laid down in the present section: and it is doubtful whether in India such a doctrine can be now considered law.

In the latter case, the point would seem to be whether the receipt of the money by the one person on behalf of the other could be proved without reference to the illegal transaction. It is quite clear that money paid *in execution* of an illegal contract could in no case be recovered.

In *Ayerst v. Jenkins* (*d*), Lord Selborne thus summarized the English law on this subject: "Most of the older authorities on the subject of contracts founded on immoral consideration are

(*a*) *Farmer v. Russell*, 1 B. & P., 296.

(*b*) *Johnson v. Lansley*, 12 C. B., 468; *Beeston v. Beeston*, 1 Ex. D., 13.

(*c*) *Davenport v. Whitmore*, 2 My. & Cr., 177.

(*d*) L. R., 16 Eq., 282.

collected in the note to *Benyon v. Nettlefold* (a). Their results may be thus stated :

- (1.) Bonds or covenants founded on past cohabitation, whether adulterous, incestuous or simply immoral, are valid in law, and not liable (unless there are other elements in the case) to be set aside in equity.
- (2.) Such bonds or covenants, if given in consideration of future cohabitation, are void in law, and therefore, of course, also void in equity.
- (3.) Relief cannot be given against any such bonds or covenants in equity if the illegal consideration appears on the face of the instrument.
- (4.) If an illegal consideration does not appear on the face of the instrument, the objection of *particeps criminis* will not prevail against a bill of discovery in equity in aid of the defence to an action at law.
- (5.) Under some (but not under all) circumstances, when the consideration is unlawful, and does not appear on the face of the instrument, relief may be given to a *particeps criminis* in equity.

“In the cases of this class there has been no actual transfer of property from the obligor or covenantor to the obligee. The contract has always remained *in fieri*: the bond or covenant conferred a mere right of action, and conferred that right only if there was a good and lawful consideration, which, in the absence of evidence to the contrary, the law would presume from an instrument under seal. If the consideration is unlawful, there is no legal obligation; and if the proof of such illegal consideration depends on extrinsic evidence, and does not appear on the face of the instrument, a Court of Equity may, for that reason, give relief, upon the principle explained by Lord Cottenham in *Simpson v. Lord Howden* (b).

“In the present case relief is sought by the representative, not merely of a *particeps criminis*, but of a voluntary and sole donor, on the naked ground of the illegality of his own intention and purpose; and that, not against a bond or covenant or other obligation resting *in fieri*, but against a completed

(a) 3 Mac. & G., 100.

(b) 3 My. & Cr., 97.

transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees, ten years before the bill was filed, for the sole benefit of the defendant. I know no doctrine of public policy which requires or authorizes a Court of Equity to give assistance to such a plaintiff under such circumstances. When the immediate and direct effect of an estoppel in equity against relief to a particular plaintiff might be to effectuate an unlawful object, or to defeat a legal prohibition, or to protect a fraud, such an estoppel may well be regarded as against public policy. But the voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law; and the present is not the case of a man repenting of an immoral purpose before it is too late, and seeking to recall, while the object is yet unaccomplished, a gift intended as a bribe to iniquity. If public policy is opposed (as it is) to vice and immorality, it is no less true, as was said by Lord Truro in *Benyon v. Nettlefold*, that the law, in sanctioning the defence of "*particeps criminis*," does so 'on the grounds of public policy, namely, that those who violate the law must not apply to the law for protection.'

It seems to obtain as a general rule, that if the illegal purpose remains unexecuted, a person who has paid money or delivered goods with the intention of effecting it may recover them. The mere intention of effecting it does not prevent him suing to recover money for which the defendant has given no consideration. Thus, where plaintiff, with the view of defeating his creditors, handed over all his trade-stock to A, and A afterwards, without plaintiff's knowledge, transferred them by bill of sale to defendant, who was one of plaintiff's creditors, but no such arrangement as was intended was made with the creditors; it was held that plaintiff, not relying on the illegal transaction, and the fraudulent purpose not having been executed, was entitled to recover the goods from the defendant, who, as he took with knowledge, had no better title than A (a).

The mere intention to perform, in an illegal manner, an agreement capable of legal performance, does not necessarily render it voidable. Thus, in *Waugh v. Morris* (b), a ship was chartered in

(a) *Taylor v. Bowers*, 1 Q. B. D., 291.

(b) *L. R.*, 8 Q. B., 202.

France to take a cargo of hay to London, and it was agreed that the hay should be taken to Deptford Creek and landed there. At the time of making the contract it was illegal to land hay brought from France at any English port; but neither party knew of this. On arriving in the Thames the Captain found that it was illegal to land the cargo, and accordingly, after some delay, trans-shipped it for exportation. On his being sued by the ship-owner for the detention of the ship, it was held, that there was no such illegality in the contract as disentitled the plaintiff from recovering. The contract was capable of being performed in a legal manner, and though there was at one time an intention to perform it in a manner which would have been illegal, this was abandoned when its illegality was known. A contract which cannot be performed without a violation of the law is void whether the parties knew the law or not: but when an attempt is made to avoid a contract, capable of being legally performed, on the ground of an intention to perform it in an illegal manner, it is necessary to show a wicked intention to break the law.

A contract to leave money by will is not illegal, and such contract need not be in writing, although, by the law to which the person in question is subject, the will itself would have been invalid if not in writing. In *Ridley v. Ridley* (a) a verbal undertaking by a trustee to his *cestuis que trust* that, if they would concur in a sale of the Trust Estate in which he was interested, he would bequeath them "at least as much as they would get under their father's will," was enforced by the Court. A covenant to give or leave all the covenantor's estate to his children affects only such property as he is possessed of at the time of his death: but the covenant may be to leave all the property of which the covenantor becomes possessed during coverture (b).

A mere covenant to leave does not deprive the covenantor of unlimited power of dealing with the property *bond fide* during life: but a disposition for the purpose of defeating the covenant will be a fraud upon it and void. In *Randall v. Willis* (c), a transfer of stock by a father to one of the children (there being a reservation of the dividends to the father for life and other

(a) 34 Beav., 478. (b) *Lewis v. Maddocks*, 17 Ves., 48.

(c) 5 Ves., 266.

evidence of a partial intention to defeat the covenant) was set aside. In *Fortescue v. Hennah* (a), a disposition by a father under like circumstances, was treated as in effect testamentary, as he reserved to himself an interest for life.

An agreement for securing votes is not necessarily illegal. Thus, in a recent case (b), "the plaintiff and defendant were both subscribers to a charity, the objects of which were elected by the subscribers, who had votes proportioned in number to the amount they had subscribed. They expressly agreed that, if the plaintiff would give twenty-eight votes for an object of the charity whom the defendant favored, the defendant would, at the next election, give twenty-eight votes for such object of the charity as the plaintiff should then favor:" it was held "that there was a legal consideration for the defendant's promise, and that the agreement was not void as against public policy."

When subjects of the British Government enter into contracts abroad to raise money to support the subjects of a friendly Government in hostility against their own Government, the contract is regarded as contrary to public policy (c).

It was observed by Best, J., that "there is not any decided case in which the power to maintain an action arising out of the relation of master and slave has been recognized in this country" (d). But in *Santos v. Illidge* (e) it was held by the Exchequer Chamber, that there was nothing in the English Statutes to prohibit a sale of slaves by a British subject, lawfully held by him in a foreign country where the possession and sale of slaves is lawful; and, therefore, where a British subject, domiciled in Brazil, sold slaves to a Brazilian subject, the contract was enforced in this country.]

VOID AGREEMENTS.

24. If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Agreements
void if considera-
tions and objects
unlawful in part.

(a) 19 Ves., 66.

(b) *Bolton v. Madden*, L. R., 9 Q. B., 55.

(c) *De Witz v. Hendricks*, 2 Bing., 314.

(d) *Forbes v. Oochrane*, 2 B. & C., 470.

(e) 8 C. B., N. S., 861.

Illustration.

A promises to superintend, on behalf of B, a legal manufacture of indigo and an illegal traffic in other articles. B promises to pay to A a salary of 10,000 rupees a year. The agreement is void, the object of A's promise, and the consideration for B's promise, being in part unlawful.

[This section is merely an amplification of the last sentence of Section 23. Where there are reciprocal promises in a contract, the object of the contract, as it effects one of the parties, is its consideration as regards the other party; and, therefore, the result is that, if anything promised to be done on either side is unlawful, the whole contract is void. This is shown in the Illustration. The superintendence of the illegal traffic is the object of A's promise, *i. e.*, that which he promises; it is the consideration for B's promise to pay A rupees 10,000 per annum: being unlawful, it renders the whole contract void.

This is, so far as regards the effect of illegal consideration in rendering the contract void, an exact reproduction of the English law. "If either part of the consideration be illegal," said Tindal, C. J. (a), "the whole falls to the ground, for a party cannot enforce a contract, where the consideration is illegal either in the whole or part." A party, therefore, to whom, for some illegal consideration, a promise has been made, cannot enforce the promise, although it is legal. But the other party to the transaction, to whom, for a legal consideration, a promise, partly legal and partly illegal, has been made, can enforce so much of it as is legal (b). And the principle of enforcing a partly illegal contract, in so far as it is legal, has been applied in this country (c). Strictly construed, the language of this section excludes such a principle, for it declares that illegality as well in the object as in the consideration invalidates the contract, and no exception from the rule is specified except in the cases coming under Section 57 or 58. Under the first of those sections, if a man promises to do something legal, and secondly, under certain circumstances, something illegal, the first part of the

(a) *Waite v. Jones*, 1 Bing., N. C., 656.

(b) *Greenwood v. Bishop of London*, 5 Taunt., 727.

(c) *Poonoo Bibee v. Fyez Bukah*, 15 B. L. R., App., 5. See also the judgment of Couch, C. J., in *Joseph v. Solano*, 9 B. L. R., 441.

promise is enforceable, notwithstanding the illegality of the second. Under section 58, where a man promises to do either something which is legal, or something which is illegal, his promise to do the legal thing is good ; but in both these cases it is clear that part of the consideration and of the object is unlawful.]

Agreement
without consi-
deration void,
unless

25. An agreement made without consideration is void (1), unless

(1) it is expressed in writing (2) and registered under the law for the time being in force for the registration of assurances, and is made on account of natural love and affection between parties standing in a near relation to each other ; or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do (3) ; or unless

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits (4).

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely

because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given (5).

Illustrations.

(a.) A promises, for no consideration, to give to B Rs. 1,000. This is a void agreement.

(b.) A, for natural love and affection, promises to give his son, B, Rs. 1,000; A puts his promise to B into writing and registers it. This is a contract.

(c.) A finds B's purse and gives it to him. B promises to give A Rs. 50. This is a contract.

(d.) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract.

(e.) A owes B Rs. 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B Rs. 500 on account of the debt. This is a contract.

(f.) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A's consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g.) A agrees to sell a horse worth Rs. 1,000 for Rs. 10. A denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A's consent was freely given.

[1] The reason why the law enforces only those promises which are made for a consideration is that gratuitous promises are often made rashly and without due deliberation, and that, therefore, if promises made without consideration were enforceable, there would be a risk of a man's binding himself without any deliberate intention to do so. Another mischievous consequence of the enforcement of such promises would be the frequent preference of voluntary undertakings to the claims of real creditors. The exceptions to the general rule are, as will be seen, cases in which the formalities observed and the relations of the parties are such as to rebut the probability of inadvertence or rashness suggested *prima facie* by the absence of consideration, and so also is a promise to compensate a witness for his loss of time in attending Court, because the witness was bound, respectively of any promise, to attend.

By the Evidence Act, 1872, Section 114, in Illustration (c), the Court *may* presume that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration. This provision is in accordance with the custom of merchants, according to which bills of exchange and promissory notes are presumed to have been made on consideration "till the contrary appear or at least appear probable." Nor does the fact of the bill being an accommodation bill raise a presumption that no money has been obtained on it. Unless, therefore, there is some fraud in connection with the bill, the *onus probandi* lies in such a case on the defendant (a).

(2) According to English law a deed under seal dispenses with consideration, as the formalities attendant upon the execution of it are supposed to guarantee the deliberation of the transaction. This doctrine has not been adopted in India, and it had been, previously to the passing of the Act, decided in the Privy Council that the fact of an instrument being under seal does not in Indian Courts import consideration (b).

Under the present law, the fact of an agreement being in writing dispenses with consideration only in the cases mentioned in (1), and (3). In the one case the near relationship of the parties, the natural motive for the agreement, coupled with the formalities of a written instrument and registration, render proof of consideration superfluous; in the other, there is practically nothing more than a promise not to take advantage of a technical defence to a just claim, and it is declared to be unnecessary that any consideration for such an act should be shown (c).

(3) The word "voluntarily" in the first branch of this subsection must, it would appear, be taken to mean, "otherwise than at the desire of the promisor:" it will thus cover the cases which fall outside the provision of Section 2 (d) as to cases in which there is a consideration for a promise.

It thus restores the doctrine, propounded by Lord Mansfield, that, where there is a moral obligation not enforceable at law, and

(a) Byles, 12 Ed., 119.

(b) *Raja Sahib Prahlaḍ Sen v. Baboo Budhu Sing*, 2 B. L. R., P. C., 111.

(c) For illustration, see *Poonoo Bibee v. Fyez Buksh*, 15 B. L. R., App., 5.

a promise to perform it, "the honesty and rectitude of the thing is a consideration," and the promise ought, therefore, to be enforced as a contract (a). This doctrine was after some controversy finally over-ruled in *Eastwood v. Kenyon* (b), where it was held, that a promise, sustained by no consideration but a past benefit, not conferred at the defendant's request, was void. The present sub-section dispenses with the necessity of stating previous request or any consideration, and gives to a promise made under such circumstances the obligatory force given to it by Lord Mansfield.

The second branch of this sub-section is really an illustration of the more general proposition stated in the first. It may be compared with Section 69, according to which the plaintiff must allege that he was interested in the payment of the money which he seeks to recover. Under this sub-section he need not allege such interest, but he must allege a subsequent promise. Here the obligation arises, not out of the circumstances under which the payment was made, but out of the subsequent promise.

(4) The third exception from the general rule requiring a consideration to support a promise relates to the case of debts barred by the Act of Limitation. The promise must be in writing and signed by the party chargeable or his agent. The provisions here made differ in two particulars from that contained in Section 19 of the Limitation Act; for, whereas here reference is made to a barred debt and a promise is required, the section of the Limitation Act refers to a debt not yet barred and requires an acknowledgment only. In the one case a promise gives a fresh cause of action in place of that which is already extinguished; in the other an acknowledgment gives a fresh period to a debt which is still running. In England this distinction is not observed and a promise in writing is required, whether time is still running in respect of the debt or not. However, an unequivocal, unreserved acknowledgment of a debt suffices, because from it a promise to pay may be implied (c). The question may arise whether such an acknowledgment could be treated as a promise so as to satisfy the provision of this Act. If the promise to pay is coupled with a condition, then, according to the

(a) *Hawkes v. Saunders*, Cowp., 289.

(b) 11 A. & E., 438.

(c) *Tanner v. Smart*, 6 B. & C., 604.

English cases, the creditor may sue upon it when the condition is performed. So also it would be here under this section. The promise, whether simple or conditional, after satisfaction of the condition, gives a new cause of action.

On the other hand, the effect of an acknowledgment under the Limitation Act being merely to renew the period for the original cause of action, it follows that an admission that a sum of money will be payable on the accomplishment of a condition is not an acknowledgment of a debt (a). Such an admission cannot renew a period of limitation, because it does not presuppose the accrual of any cause of action. The only effect, therefore, that could be given it would be to treat it as itself founding a cause of action.

If a person owing a debt not yet barred by limitation promises without any consideration to pay it on the happening of a future uncertain event, the question may arise whether that promise creates a cause of action. It is clearly inoperative as an acknowledgment under the Limitation Act, and strictly it does not satisfy the terms of this section, because it relates to a debt not yet barred. Yet it would be a strange anomaly that a promise made with regard to an unbarred debt should be held invalid, while a promise to pay a barred debt is held binding.

(5) "It is true," said Lord Westbury, "that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition" (b). Where the parties stand in an unequal relation, the question of adequacy of consideration is material, because, on failure of it, the transaction is liable to be cancelled—undue influence being readily presumed to have existed in such cases (c). See note to Section 16.

Lord Eldon expressed himself on this matter as follows, in a case where specific performance of an agreement for sale was sought—"Inadequacy of price is quite out of the question. The

(a) *Young v. Mangalapilly*, 3 Mad. H. C., 309.

(b) *Tennent v. Tennents*, L. R., 2 Sc. App., 9; *Administrator-General of Bengal v. Juggeswar Roy*, I. L. R., 3 Cal. Ser., 192.

(c) *Omda Khanum v. Brojendro Coomar Roy Chowdhry*, 12 B. L. R., 481.

cases of reversions and interests of that sort go upon very different principles. In some the whole duty of making good the bargain upon the principles of this Court is upon the vendee; as in the instance of heirs expectant. Inadequacy of price does not depend upon a person giving *pretium affectionis* from any peculiar motive, beyond what any other man would give, the reasonable price. But farther, unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not itself a sufficient ground for refusing a specific performance" (a). As to whether specific performance will be refused on the ground of undervalue alone, see collection of cases in Pollock on Contract, p. 522 *et seq.*]

Agreement in
restraint of mar-
riage, void.

26. Every agreement in restraint of the marriage of any person, other than a minor, is void.

[This section corresponds with the rule of English law: but it would appear to be somewhat wider in its provisions, inasmuch as, in the English Courts, an arrangement having for its object, not a general restraint of marriage, but a restraint of a marriage with a particular person, would not be regarded as illegal (b). Nor, according to the English authorities, would a restriction against marriage with a native of any particular country, or a person belonging to a particular religious sect; nor a condition prescribing the ceremonies of the marriage, or prohibiting marriage before 21 or other reasonable age (c).

A bond, however, not to marry any one but the obligee who did not engage to marry the obligor, would be void (d). So also a wagering contract not to marry within 6 years (e): but a covenant to pay a person an annuity of £40 for life, with a provision

(a) *Coles v. Trecothick*, 9 Ves., 246.

(b) *Lady M. Topham v. Duke of Portland*, 32 L. J., Ch., 81; *Jervois v. Duke*, 1 Vern., 19.

(c) *Scott v. Tyler*, 2 W. & T. L. C., 190.

(d) *Lowe v. Peers*, 4 Burr., 2225.

(e) *Hartley v. Rice*, 10 East., 22.

for its reduction to £20 in case of her marriage, is not void on the ground of being in restraint of marriage (a).]

27. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void (1).

Agreement in restraint of trade, void.

Exception 1.—One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business (2).

Saving of agreement not to carry on business of which good-will is sold ;

Exception 2.—Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding exception (3).

of agreement between partners prior to dissolution ;

Exception 3.—Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership (4).

or during continuance of partnership.

[(1) This section carries out the doctrine of the English law, that general restraints of trade are wholly bad, and that partial restraints are presumed to be bad until shown to be reasonable (b).]

(a) *Webb v. Grace*, 18 L. J., Ch., 13.

(b) *Mitchel v. Reynolds*, 1 P. Wms., 181 ; 2 Ph., 701.

The principle on which this rule is grounded has been thus laid down in a recent case :—

“Public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the State of his labor, skill or talent, by any contract that he enters into. On the other hand, public policy requires that, when a man has, by skill or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and, in order to enable him to sell it advantageously in the market, it is necessary that he should be able to preclude himself from entering into competition with the purchaser” (a).

The present section in some degree narrows the provisions of the English law on the subject, by rendering illegal all agreements in restraint of trade, save the three classes mentioned in the Exceptions. Agreements, accordingly, by commercial travellers not to travel in certain districts; by clerks, servants, and apprentices not to carry on their master's trades, and others of a like character, not falling within the scope of the three Exceptions, cannot, it would seem, be legally made in this country.

“Trade in India is in its infancy; and the Legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained” (b).

In the case of *Gravelly v. Barnard* (c), the plaintiff, a surgeon, engaged the defendant (who was not qualified to practise, but was studying with a view to pass the necessary examination) to assist him in his practice, the engagement being terminable at the will of either party. Previously to going up for examination, the defendant executed, at plaintiff's request, a bond which was conditioned to be void if the defendant should not practise within certain limits, but which contained no express agreement on the part of the plaintiff to continue the defendant's employment. The defendant remained in the plaintiff's employment for about three months afterwards, and was then dismissed. He subsequently commenced practising within the prescribed limits, and a suit was

(a) *Leather Cloth Company v. Lorrson*, L. R., 9 Eq., at p. 354.

(b) *Per Kindersley, J.*, in *Oakes v. Jackson*, 1 L. R., 1 Mad., at p. 145.

(c) L. R., 18 Eq., 518.

successfully brought to restrain him from so doing. Sir G. Jessel, M. R., held that, there being an implied agreement by plaintiff to continue defendant's employment on the old terms, there was consideration to support the bond, and that plaintiff was, therefore, entitled to an injunction. Such a bond could not, it would appear, be enforced under the present section. It hardly needs to be pointed out that the restriction aimed at by the section is not an absolute restriction, and that an agreement may still fall within its terms though only affecting to create a partial restriction: otherwise the 1st Exception would be superfluous (a).

(2) The test adopted by the English Courts, in deciding whether the limits, in each case, are reasonable, has been to consider whether the restraint is "larger and wider than the protection of the party with whom the contract is made can possibly require" (b). If it is, the contract is regarded as prejudicial to the general interests, and cannot be enforced. On this ground, contracts in restraint of trade, unlimited as to space, have invariably been held illegal; and it matters not in such a case that the restriction is limited as regards time. Thus, in *Ward v. Byrne* (c), the defendant had covenanted not to be employed, directly or indirectly, in the business of a coal merchant for nine months after he left the plaintiff's employ; the covenant was held to be void, Parke, B., observing, "when a general restriction, limited only as to time, is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return."

Where, however, there is some limit as to space, and the question is, whether this is reasonable or not, the Court will take into account the duration of time for which the restraint is imposed: "that which would be unreasonable were it to continue for any length of time, may not be so when it is to last only for a day or two" (d).

The subject was discussed at length in *Mallan v. May* (e), and the rule of testing the reasonableness of the contract by the

(a) *Madhub Chunder Poramanick v. Rajcoomar Doss*, 14 B. L. R., 76.

(b) *Hitchcock v. Coker*, 6 A. & E., at p. 454.

(c) 5 M. & W., 548.

(d) *Proctor v. Sargent*, 2 M. & G., 20.

(e) 11 M. & W., 653.

consideration whether the restriction is larger than is required for the party with whom the contract is made, was adopted by the Judges. The decided cases show how this principle has been applied by the Courts. Thus, a contract not to practise as a dentist in London was, in the case just mentioned, held reasonable: but a contract not to practise as a dentist within 100 miles of York was regarded as void (a). Solicitors have been allowed to enter into very wide covenants of restraint: thus, a covenant not to practise as a Solicitor and Attorney in London and within 150 miles has been upheld (b): and Lord Langdale, M. R., went so far as to uphold as reasonable a covenant not to practise as a Solicitor in Great Britain for 20 years, on the ground that the public interest was not likely to be affected by the Solicitor in question being so restrained.

In the case of *Mallan v. May*, and subsequently in *Price v. Green* (c), it was held that contracts in restraint of trade, which were in their nature divisible, some of the restraints of which were reasonable, and some void as being unreasonably wide, might yet be upheld so far as regarded such of the restraints as were reasonable. Thus, in *Mallan v. May* the covenant was, not to practise as a dentist in London nor in any of the towns or places in London or Scotland in which the plaintiff had practised: the covenant as to London was upheld, though the covenant as to the othertowns was regarded as illegal. In *Price v. Green*, the covenant was not to carry on business as perfumers in London and Westminster, or the distance of 600 miles from the same respectively: it was ruled in the Exchequer Chamber, that the covenants were divisible, and that the illegality of the one did not preclude the plaintiff from recovering for a breach of the other. The words in the present section "to that extent void," would seem to indicate an intention on the part of the framers of the Act to preserve a similar rule for this country. Parties in England entered into a written agreement with the partners of a firm carrying on business in Madras, to go to Madras and there enter into the service of the firm; the service was to last for five years or to be deter-

(a) *Horner v. Graves*, 7 Bing., 735.

(b) *Bunn v. Guy*, 4 East, 190.

(c) 16 M. & W., 346.

mined at any time by certain notice being given ; and covenanted that, on the expiry of the five years, or sooner determination of the service, they would not carry on within 800 miles from Madras any business carried on by the firm. It was held that, "treating the covenant in restraint of trade as one entered into in England, it could not, even if valid by the law of England, be enforced in India, inasmuch as its object was to contravene the law of India," namely this section ; and it was further held that "that covenant would have been void by the law of England, because the limit of the restriction was unreasonable, and, as no narrower limit had been mentioned in the agreement, this was not a case where the covenant could have been enforced within a narrower and reasonable limit" (a).

In *Allsopp v. Wheatcroft* (b) the decision turned upon the question whether the restraint was more than was necessary for the plaintiff's protection, and the agreement was held void upon this ground.

In *Bishop v. Ketchin* (c), the suit was to recover arrears of an annuity, the consideration for which was an agreement in restraint of trade, which appeared to be legal as to some parts of it and illegal as to others. The Court, without determining the question of the legality of the contract, held that the plaintiff, who had performed his part of the contract and submitted to the restraint, was clearly entitled to recover. The *ratio decidendi* in this case seems to be, that contracts in restraint of trade, though, under certain circumstances, regarded as void, are not vicious and illegal *in toto*, as, for instance, is an agreement for illicit cohabitation ; although, therefore, the Courts will not enforce those parts of such a contract which they consider unreasonable, still, for other purposes than the enforcement of such unreasonable parts, the contract, not being vitiated throughout, will be upheld. This view is favored by the observations of Lord Abinger, C. B., in *Wallis v. Day* (d), where he drew a distinction

(a) *Oakes v. Jackson*, 1 L. R., 1 Mad., 134.

(b) L. R., 15 Eq., 59.

(c) 38 L. J., Q. B., 20. See also *Avery v. Langford*, 1 Kay, 666, where a tabular statement of the various rulings is annexed.

(d) 2 M. & W., 281.

between actions to enforce a covenant, void as being in unreasonable restraint of trade, and actions to recover the sum stipulated for by the person who had suffered the restriction. "I should," said His Lordship, "require a strong authority to say (although the prohibition would not be binding as against the party himself) that, there being nothing *criminal* in the contract, he should not have the benefit of it, where he has in fact performed it" (a).

The restraint must be only for "so long as the buyer or some person claiming under him carries on a like business." Care must be taken to insert this provision in agreements of this nature: in its absence they will be void.

Contracts simply in restraint of trade must not, however, be confounded with contracts in which a trade-secret is sold, in which case a far wider measure of restriction is permissible. In the *Leather Cloth Company v. Lorsont* (b), the object-matter of the contract was a particular manufacture, carried on partly under patents, and partly by processes known only to the vendors and their servants. The vendors covenanted not directly or indirectly to carry on, nor to set up, or, to the best of their power, allow to be set up by others, in *any part of Europe*, any Company or manufactory having for its object the manufacture or sale of productions now manufactured in the vendor's manufactory, and not to communicate to any person the means or processes of such manufactory, so as in any way to interfere with the exclusive enjoyment by the purchasing Company of the benefits agreed to be purchased. James, V. C., held that this was, under the circumstances, not an unreasonable restriction: that the transaction was practically the sale of a trade-secret, and that such secrets might be legally sold, "with a stipulation unlimited as to time and place as to communicating the secret, or dealing with it so as to interfere with the purchaser. It is settled by authority that a man may bind himself not to communicate that process to anybody else anywhere, under any circumstances, in any part of the world." From this it necessarily follows that the vendor must be able to restrict himself from carrying on the manufacture, as the necessary results of his doing so would have been

(a) 2 M. & W., 276.

(b) L. R., 9 Eq., at p. 354.

the communication of the secret to the persons engaged in the manufacture.

(3) This Exception might with advantage be extended so as to include the case of clerks, apprentices, pupils, servants and others, whom it may be desirable to restrict from practising a like trade within a certain distance from the place where they have been so employed. At present such restrictions would be illegal.

An agreement not to re-commence business is not implied from the mere circumstance of a person selling the good-will of his business to another, or of a partner retiring from a firm and assigning his interest to the remaining partners (a): but if such a retired partner so conducts his business as to lead the public to suppose that they are dealing with the old firm, he will be restrained by injunction; and the same principle would apply to any vendor of the good-will of a business (b).

(4) It is obviously necessary, in many cases of partnership, that the partners, or some of them, should stipulate to give up the whole of their time to the management of the partnership's concerns. This would be impossible but for the present Exception. As to the position of a partner who has carried on any business competing or interfering with the partnership-business, see Section 259.]

28. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Agreements in restraint of legal proceedings, void.

Exception 1.—This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects, shall

Saving of contract to refer to arbitration dispute that may arise.

(a) *Cruttwell v. Lye*, 17 Ves., 335.

(b) *Churton v. Douglas, Johns.*, 174.

be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred(1).

When such a contract has been made, a suit may be brought for its specific performance; and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Exception 2. — Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration (2).

[1] The first point to be determined in construing this section is the meaning of the term "rights under or in respect of any contract," the question being, whether it is intended to denote only rights actually existing, or also rights which may accrue hereafter. Reference to the second Exception, in which the term used is "any question... which has already arisen," seems to show that the section was not intended exclusively to refer to rights already existing. If such exclusive reference only had been intended, the Exception could have been dispensed with. And yet it is difficult to suppose that the Legislature can have meant that the general proposition enunciated should affect agreements concerning existing rights. The section cannot, for instance, be intended to invalidate compromises, although the effect of a compromise certainly is to restrict a party from enforcing a disputed right; nor can it be taken to invalidate a covenant to suspend a right of action, or a covenant not to sue at all,—the former of which is, according to English law,

ground for an action, while the latter is pleadable as a release in order to avoid circuity of action (a): nor again can the section be aimed at agreements not to appeal, which, as well before as since the passing of the Act, have been held valid (b). On the other hand, if a contract between two persons contained a stipulation that no action should be brought upon it, such stipulation would unquestionably be void (c).

(2) The case stated as an Exception does not seem to merit that name. The general rule being that agreements whereby parties affect to oust the jurisdiction of the Courts are void, no infraction of that rule is involved in allowing, as legal, agreements whereby the acquisition of a right is made dependent on the fact of an arbitration and award having taken place. A stipulation that any question shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable, affects the acquisition of a right by interposing a condition, but it involves no attempt to withdraw the adjudication of the right when once acquired from the ordinary Courts: no more than does the stipulation which may be made on a contract of sale, that the price or quality shall be settled by reference to some third party. The decision on which the so-called Exception is based is that of *Scott v. Avery*, where the position adopted was that "if the original agreement is not simply to pay a sum of money, but that a sum of money shall be paid if something else happens, and that something else is that a third person shall settle the amount, then no cause of action arises until the third person has so assessed the sum" (d). It was held, upon the construction of the agreement in question, that the ascertainment of the loss by the Committee, or by arbitration, was a condition precedent, and that without such ascertainment the plaintiff had no cause of action. A collateral and separate agreement to refer does not, according to the English authorities,

(a) *Cumber v. Wane*, 1 Smith's L. C., 301.

(b) *Munshi Amir Ali v. Maharani Inderjit Koer*, 9 B. L. R., 460; *Anant Das v. Ashburner & Co.*, 1 L. R., 1 All., 267.

(c) *Coringa Oil Co. v. Koegler*, 1 L. R., 1 Calc., 466; *Elliott v. Royal Exchange Co.*, L. R., 2 Ex., 244.

(d) 5 H. L. C., 811. See *Elliott v. Royal Exchange Co.*, L. R., 2 Ex., 245.

afford any answer to an action on an independent covenant to pay money; nor would it do so here except from the Specific Relief Act. In England, the plaintiff may sue on the covenant to pay money notwithstanding the covenant to refer, leaving the defendant to pursue one of two courses, either to bring an action for not referring, or to apply under the Common Law Procedure Act. Thus, in *Dawson v. Fitzgerald* (a), a lessor covenanted with his lessee that he would keep such a number only of rabbits as would do no harm to the crops; and that in case he kept such a number as should injure the crops he would pay a fair and reasonable compensation; the amount of it, in case of difference, to be referred to two arbitrators or an umpire. It was held that the covenant to refer was distinct from and collateral to the other covenant, and that the action for the breach of the latter covenant was maintainable although there had been no arbitration. Similarly, it has been held here that the ordinary clause for reference to arbitration contained in commercial contracts does not oust the jurisdiction of the Courts, or prevent an action being brought on the principal contract (b). But now, by the Specific Relief Act, Section 19, it is enacted that, if any person who has made a contract to refer a controversy to arbitration and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar such suit. Apparently, a contract to refer is to afford a defence whether or not it is independent of the contract sued on; but it affords a defence only against the party who has refused to abide by the reference. It may be questioned whether a contract to refer a controversy to arbitration can be taken to include the ordinary arbitration-clause which is agreed to before any controversy has arisen, and must not be restricted to the case of contracts to refer actual controversies.

The second paragraph of the Exception is repealed by the Specific Relief Act, which also declares expressly that no contract to refer a controversy to arbitration shall be specifically enforced. An action for damages for breach of such contract is maintainable now as it was before the passing of the latter Act.

(a) L. R., 9 Ex., 7; 1 Ex. D., 257.

(b) *Coringa Oil Co. v. Koegler*, 1 L. R., 1 Cal., 466. Compare *Willesford v. Watson*, L. R., 8 Ch., 473.

Contracts with regard to disputes about rights, other than rights arising under or in respect of a contract, do not fall within the scope of the section, and are not therefore illegal, unless on the ground of repugnance to public policy. Such contracts would, if submitted, be held valid so far as they did not improperly restrain the liberty of the subject (a).

As to references to arbitration during a pending suit, see Code of Civil Procedure, Section 506 : as to agreements in writing to refer, and awards to be filed in Court, Sections 523 and 525. Persons who have agreed to submit their disputes to arbitration are not, according to the proper construction of Act VIII of 1859, entitled to withdraw their submission unless for good cause, and a mere arbitrary revocation is not permitted. The cases (b) which, following the English authorities on this matter, proceeded on the assumption that such revocation was possible at any time, must be considered overruled by the Privy Council decision in *Pestonjee Nussurwanjee v. Manockjee*. It was there said that the current of legislation had been to put "agreements for arbitration on the same footing as all other lawful agreements by which the parties are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract" (c). The doctrine thus stated is, remarks Holloway, J., "the very opposite of the English in the mode in which the contract is to operate" (d). English Courts of Equity will not grant specific performance of agreements to refer to arbitration (e). In a reference under Section 16 of Act XX of 1863 (Religious Endowments), the Judge made a decree in accordance with the finding of the majority of the arbitrators. It was held that this was valid without the consent of the parties, as the Judge might originally have directed that the finding of the

(a) 12 M. I. A., 131.

(b) *Kula Nágabúshanam v. Kula Sésháchalam*, 1 Mad. H. C., 178 ; *A. Aiyappa v. N. Peraiya*, 3 Mad. H. C., 82.

(c) 12 Moo. I. A., 131, confirming 3 Mad. H. C., 183.

(d) *Santaiya v. Rámaráya*, 7 Mad. H. C., 257.

(e) Fry on Spec. Perf., 417.

majority should be binding, and his ratification was equivalent to a previous command (a).]

29. Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Agreements
void for uncer-
tainty.

Illustrations.

(a.) A agrees to sell to B 'a hundred tons of oil.' There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b.) A agrees to sell to B one hundred tons of oil of a specified description known as an article of commerce. There is no uncertainty here to make the agreement void.

(c.) A, who is a dealer in cocoanut-oil only, agrees to sell to B 'one hundred tons of oil.' The nature of A's trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(d.) A agrees to sell to B 'all the grain in my granary at Rámnagar.' There is no uncertainty here to make the agreement void.

(e.) A agrees to sell to B 'one thousand maunds of rice at a price to be fixed by C.' As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f.) A agrees to sell to B 'my white horse for rupees five hundred or rupees one thousand.' There is nothing to show which of the two prices was to be given. The agreement is void.

[Where it is impossible to say upon what terms parties have agreed, there is in reality no expressed consent, and, therefore, no contract which can be enforced. Thus, in *Guthing v. Lynn* (b), which was an action on a warranty of a horse, it was proved that the horse was sold for sixty guineas, and "if the horse was lucky to the plaintiff, he was to give £5 more, or the buying of another horse." The Court refused to give any weight to this evidence, because the alleged agreement was unintelligible, and could only be regarded as some honorary understanding between the parties. It is expressly provided by the Specific Relief Act, that a contract, the terms of which the Court cannot find with reasonable certainty, cannot be specifically enforced (Section

(a) *Immedy Kanuga Rámáya Gaundan v. Rámáswámi Ambalam*, 7 M. H. C., 173.

(b) 2 B. & Ad., 232.

21). But a contract may be sufficiently certain to entitle a party to damages for a breach of it, and yet not certain in the sense that a Court will decree its specific performance; see illustrations to Section 21. If, however, there is some obvious error or omission on the face of the agreement, the Court can alter it so as to make the agreement certain. Thus, the Court struck out the word "not" in the condition of a bond, which stated that it was to be void if the obligor did *not* pay what he promised (*a*). See, as to the rectification of instruments, Specific Relief Act, Section 31. As to the admissibility of oral evidence to explain or give certainty to written agreements, see the Indian Evidence Act, Sections 93 to 97.

An agreement is not void for uncertainty because the object of it is indeterminate, for parties may agree to deal with an uncertain object. Where parties agree, the one to buy, the other to sell, an estate of which the extent is unknown to both, neither party can object in regard to its extent (*b*). Where a man purchased for Rs. 8,000 the chance of getting Rs. 35,000 dependent on a certain sale being set aside, it was held that he had no right of action because in the event he was disappointed (*c*). See note to Section 88.]

30. Agreements by way of wager are void; and

Agreements by
way of wager,
void.

no suit shall be brought for recovering anything alleged to be won on

any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made (1).

This section shall not be deemed to render unlawful a subscription or contribution, or

Exception in
favour of certain
prizes for horse-
racing.

agreement to subscribe or contribute, made or entered into for or toward any plate, prize or sum of money, of

(a) Cited in *Wilson v. Wilson*, 5 H. L. C., at p. 67.

(b) *Baxendale v. Seale*, 19 Beav., 601.

(c) *Ram Tuhul Singh v. Biseswar Lal Sahoo*, L. R., 2 I. A., 131; S. C., 15 B. L. R., 208.

the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race (2).

Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of Section 294A of the Indian Penal Code apply.

Section 294A
of the Indian
Penal Code not
affected.

[(1) In England, previously to the enactment of 8 & 9 Vict., c. 109, and in this country, previously to that of Act XXI of 1848, an action was maintainable on a wagering contract, provided there was nothing in it adverse to the interests or feelings of third persons, that it did not give occasion for indecent evidence, and was not contrary to public policy (a). The English Statute has furnished the model as well for the present section as for the repealed Acts XXI of 1848 and VIII of 1867. Section 41 of the Statute corresponds closely to the two first paragraphs of this section, except in one respect mentioned below. The Statute and the Act alike declare agreements by way of wagering void. It matters not that the affair to which the agreement relates is itself legal. A walking match is not illegal, yet an agreement to walk a match for £200 a side, the money being deposited with a stakeholder, is null and void (b). So is an agreement that stakes deposited by two disputants with a third person to await the determination of a question of science, and to be paid to him in whose favour the question might be decided (c).

Agreements of this character being void, it follows that a person who has, under such an agreement, deposited money with a third person may recover it back, unless there is anything in this section or in Section 65 to prevent him. It might have been thought that the words "no suit shall be brought for recovering anything intrusted to any person to abide the result of any uncer-

(a) *Ramloll Thackoorseydass v. Soojummul Dhondmull*, 4 Moo. I. A., 339; *Hampden v. Walsh*, 1 Q. B. D., 189, at p. 192.

(b) *Diggle v. Higgs*, 2 Ex. D., 422.

(c) *Hampden v. Walsh*, 1 Q. B. D., 189.

tain event" were intended to exclude any such action; and that the intention of the section was to declare as well that the man who won the wager should not recover the stakes, as that the man who had deposited money should not get it back again. But it has been held that the corresponding section of the English Statute does not bar such latter action; that it was meant to apply "only to the non-recovery by the winner of a sum deposited by the other party to abide the event, and not to the right of the depositor to recover back his deposit, if demanded before the money was paid over" (a). This action against the stakeholder may be brought even after the determination of the event unfavourably to the plaintiff, provided the money has not first been paid over to the other party without any notice to the contrary having been received by the stakeholder. "If a stakeholder pays over money without authority from the party, and in opposition to his desire, he does so at his own peril" (b).

This section makes a contract for wagering void, but not illegal (c): it does not therefore, affect the obligation of a person receiving money for another to whom he has agreed to account. It is no answer to an action on a cheque, that the money for which it was given was money due from the defendant to the plaintiff upon a contract, whereby it was agreed that the plaintiff should pay the defendant certain moneys, and that the defendant should employ them in making bets on certain races and should pay the plaintiff a certain proportion of the winnings (d). But upon the wagering contract itself no action lies. The same construction was put on the Act XXI of 1848. It was held not to make a wagering contract illegal, and therefore not to prevent the agent of a party to such a contract from suing for fees and brokerage in respect of it, or for money paid by him to other wagers on the loss of the wager (e).

By Bombay Act III of 1865, all contracts made for the purpose of carrying out wagering agreements, all contracts by

(a) *Hampden v. Walsh*, 1 Q. B. D., 196.

(b) *Hastelow v. Jackson*, 8 B. & C., 225, *per* Cockburn, C. J.

(c) *Higginson v. Simpson*, 2 C. P. D., 76.

(d) *Beeston v. Beeston*, 1 Ex. D., 13.

(e) *Párah G. Haribhai v. Ransordás Dulabhdhás*, 12 Bomb., 51.

way of security for such agreements, or for commission, brokerage, fee or reward in respect of them, are declared to be void.

(2) The section differs from the English Statute in this, that the Exception is narrowed to the case of prizes, &c., to be awarded to the winner of any horse-race, the words of the Statute being "to the winner of any lawful game, sport, pastime, or exercise." Under either enactment there must be a winner to bring the case within the Exception. So, where plaintiff and A. deposited each £50 with the defendant, agreeing that the £100 should be paid to A. if the horse trotted 18 miles in an hour, and if not then to the plaintiff,—it was held that the plaintiff was entitled to recover his stake, he having given notice to defendant not to pay over the money to A. Here there was no winner, because there was only one person, *i. e.*, the owner of the horse, who was to do anything (a).

Lotteries so frequently advertized in this country, where the prize is awarded, not to the winner of a race, but to the drawer of the winning horses' name, are, of course, wholly illegal. The publishers of such schemes are liable to a fine of 1,000 rupees: the prosecution can, however, be instituted only by order of Government. Act XXVII of 1870, Section 14.]

CHAPTER III.

OF CONTINGENT CONTRACTS.

31. A contingent contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

"Contingent contract" defined.

Illustration.

A contracts to pay B Rs. 10,000 if B's house is burnt. This a contingent contract.

[Every contract constitutes a relation between the parties to it and rights arising out of that relation, but it does not follow that every contract creates a right immediately enforce-

(a) *Batson v. Newman*, 1 C. P. D., 573.

able. The right created may be one which the parties agree shall be enforceable only on the happening of some future event, as to which neither of the parties make any promise and which is, therefore (to use the words of the section), 'collateral' to the contract, its import being merely to mark the moment at which a right created by the contract becomes enforceable. Such contracts are termed 'contingent.' The event upon which they are contingent may be wholly beyond the power of the parties, as where a promise is made contingent on the death of some person: or, as Illustration (c) to Section 32 and the Illustration to Section 34 show, may be more or less within the power of one of the parties. The material point is that it is collateral to the contract and forms no part of reciprocal promises of which the contract consists. It is in this respect that contingent contracts differ from contracts such as those referred to in Section 51, where the obligation to perform on the one side is conditional on readiness and willingness to perform on the other. In the latter, the event on which the enforceability of the contract depends is not 'collateral' to the contract, but a part of the contract itself.

The contingent matter must not be the mere will of the person who is the promisor; for a promise, say, to pay Rs. 10 'if I choose,' is clearly no promise at all (a). But a promise may be made contingent on the act of the promisor, and that act may be one entirely within his own will; thus, where one promises to pay Rs. 10 if he goes to Calcutta, this is clearly within the definition of a contingent contract.

A question, not noticed in this chapter, often arises, as to whose business it is to give notice of the happening of the event on which the contract is contingent. The general rule is, that "where a party stipulates to do a certain thing in a certain specific event, which may become known to him, or with which he can make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies within the peculiar knowledge of the opposite party, then notice ought to be given him" (b). Thus, to a declaration stating the breach of a covenant in a lease to repair

(a) *Faulkner v. Lowe*, 2 Ex., 895.

(b) *Vyse v. Wakefield*, 6 M. & W., 452.

certain buildings, a plea that the plaintiff gave no notice to the lessor of the want of repair was held good, the principle laid down being "that when a thing is in the knowledge of the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary" (a). If the event is equally within the knowledge of both, notice is not necessary (b).]

32. Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law unless and until that event has happened.

Enforcement
of contracts con-
tingent on an
event happening.

If the event becomes impossible, such contracts become void.

Illustrations.

(a.) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.

(b.) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.

(c.) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

[Contracts of sale are frequently conditional, as when the bargain is for goods on arrival by a certain ship: in such case, if the ship is wrecked or arrives without the goods, the seller is not bound (c).]

The promise may be conditional on the act of a third party; as when the price of goods is to be settled by valuers (d), or buildings are to be approved by a surveyor (e). In such cases payment cannot be enforced until the condition has been performed; and improper refusal on the part of the third party is immaterial as regards the right of either party to enforce the contract.]

(a) *Makin v. Watkinson*, L. R., 6 Ex., 25, at p. 30.

(b) *Vyse v. Wakefield*, 6 M. & W., 453.

(c) *Boyd v. Siffkin*, 2 Camp., 326.

(d) *Thurnell v. Balbirnie*, 2 M. & W., 786.

(e) *Clarke v. Watson*, 34 L. J., C. P., 148.

33. Contingent contracts to do or not to do anything if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before.

Enforcement of contracts contingent on an event not happening.

Illustration.

A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

[In Section 32 the contingency on which the contract depends is the occurrence of an event: the present section deals with cases in which the contingency on which the contract depends is the non-occurrence of an event; and the contract becomes enforceable whenever the impossibility of the event occurring is established.

The 56th Section provides that an agreement to do an act which is impossible shall be void, and also that a contract to do an act which subsequently becomes impossible, shall become void when the act becomes impossible. The impossibility of the event, upon which the promise is contingent, has the same effect upon the contract, as the impossibility of the act which is the object of the agreement.]

34. If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.

Illustration.

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die, and that C may afterwards marry B.

[The meaning of this is, that if the person whose act is the contingency on which the contract depends does anything which renders it impossible for him to name any definite time within

which he can perform the act, or which necessitates the happening of some other event beyond his control before he can perform it, the event shall be regarded as impossible. The other party would thereupon have the right to treat the contract as having become void. The Illustration to this section, it will be observed, is an instance of a contingent contract, in which the contingency is an act to be done by one of the parties, *viz.*, the marriage of C by B. In such a case, as soon as B has married C, he has by doing an act "at the desire of the promisor," supplied the consideration necessary to render the contract enforceable. His marriage of C is, accordingly, not only the contingency on which the contract depends, but the consideration which gives it validity. The Court of Chancery does not consider that the marrying of the person named is an event rendered impossible by a marriage to another person, and therefore a gift made dependent on such an event is not forfeited but merely suspended by another marriage (a).]

35. Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time, become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts become void, which are contingent on happening of specified event within fixed time.

Contingent contracts to do or not to do anything, if a specified uncertain event does not happen within a fixed time, may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

When contracts may be enforced which are contingent on specified event not happening within fixed time.

Illustrations.

(a.) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year; and becomes void if the ship is burnt within the year.

(a) *Randal v. Payne*, 1 Bro. C. C., 55.

(b.) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Agreements
contingent on im-
possible events,
void.

Illustrations.

(a.) A agrees to pay B 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b.) A agrees to pay B 1,000 rupees if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

CHAPTER IV.

OF THE PERFORMANCE OF CONTRACTS.

CONTRACTS WHICH MUST BE PERFORMED.

37. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law (1).

Obligation of
parties to con-
tracts.

Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract (2).

Illustrations.

(a.) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the Rs. 1,000 to A's representatives.

(b.) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

[(1) The origin and nature of various classes of contracts and the rights and liabilities arising out of them, having been set forth in the preceding chapters. Chapter IV introduces a new subject,—*viz.*, performance. The present section gives the force of obligation to every agreement which complies with the provisions of the Act, and which is, therefore, a contract. Unless it is discharged in some of the modes provided by the Act or by some other law, the duty of the parties to it is, as this section declares, to perform it, or, in cases where an offer to perform is tantamount to performance, to offer to perform it. This section may, accordingly, be regarded as the key-stone of the entire Act, inasmuch as from it arises the duty of performing contracts.

The direct mode in which the duty is enforced is by a suit for specific performance; the indirect mode is by suit for damages for breach of contract. A plaintiff may be entitled to damages though he could not have obtained a decree for specific performance; but he could not obtain such decree unless he could have obtained damages; see Specific relief Act.

If the contract refers to a continuous state of things, the promisor cannot withdraw from it as long as things so exist. Thus, where an uncle agreed to pay his nephew a certain annuity if he would marry a certain lady, it was held that the promise to pay the annuity was continuous and could not be revoked (a).

The case in which an offer to perform is tantamount to performance is provided for in Section 38. Cases in which performance is excused under the provisions of the Act occur in Sections 39, 41, 48, 51—56, 62, 63 and 67. Instances of other laws excusing performance of contracts are afforded by the Insolvency Act, 11 & 12 Vict., c. 21, as regards the Presidency-towns: the insolvency provisions in the Civil Procedure Code and in the Panjab Laws Act (Act IV of 1872): the various special enactments passed from time to time for the relief of particular individuals, such as the King of Oudh, the Nabob of the Carnatic, the Prince of Arcot, the Talookdars of Oudh and Broach and others,

(a) *Shadwell v. Shadwell*, 30 L. J., C. P., 145.

for whose embarrassments, for political reasons, express provision had to be made. So also the Limitation Act bars the right of action after the expiration of the prescribed time, and, therefore, has the practical effect of destroying the obligation at least in those Courts whose procedure it affects.

By the law in England, an alteration in any material part of a simple contract in writing vitiates the contract (*a*). This doctrine is not part of the law of evidence, but of substantive law, and has been set aside by this section. Even if it were a matter of evidence, the Evidence Act would have equally destroyed it (*b*). See Section 62.

(2) The obligation survives the death of the promisor and binds his representatives in all cases in which the nature or terms of the contract do not show that the contrary was intended. Where the act which is the object of the contract is one which can be performed only by the promisor, the obligation is necessarily discharged by his death. The rule of English law is, that the representatives of a deceased promisor are in general liable to the extent of the assets which come to their hands upon all contracts of the deceased undischarged at his death (*c*). The exception is in the case where the skill or character, or any personal qualities, of the promisor are necessary to the performance of the promise. Accordingly, contracts of agency are discharged by the death of the principal; contracts of partnership by the death of a partner; a contract by a master to instruct his apprentice by the death of the master (*d*); and contracts between master and servant by the death of master or servant (*e*). In *Wentworth v. Cock* (*f*) the deceased had entered into a contract for the purchase of slate to be delivered at specified dates: he died in course of delivery,—and it was held that his administrator could be sued for refusal to accept, the contract not being personal to the deceased; but in

(a) Pigot's case, 11 Co., 27a; *Davidson v. Cooper*, 11 M. & W., 778; on appeal, 13 M. & W., 343.

(b) *Ede v. Kanto Nath Shaw*, 1 L. R., 3 Cal., at p. 224, *per* Kennedy, J.

(c) 1 Wm's Saund., 216 a (n).

(d) *Baxter v. Burfield*, 2 Strange, 1266; Will. Ex., 1725

(e) *Farrow v. Wilson*, L. R., 4 C. P., 744.

(f) 10 A. & E., 42.

this case, Patteson, J., mentioned an instance in which a contract to build a lighthouse had been held to be discharged by the death of the contractor as being a matter of personal skill and science (a).

As to the devolution of the promisee's right upon his representatives, the Act is silent. The principle upon which it proceeds is the same as that just referred to. Death puts an end to contractual relations founded upon considerations of personal qualities, but it does not affect the relations of an ordinary creditor and debtor. Although, therefore, the executor of an agent cannot compel the employer to continue the employment, he can enforce all rights of demand which have accrued to the testator before his death (b).

The defendants employed S as Consulting Engineer for fifteen months to complete certain works. He was to be paid £500 for his service in equal quarterly instalments. Before the work was finished, and whilst two instalments which were due were still unpaid, he died. It was held that his representative was entitled to recover them (c). In *Beckham v. Drake* (d) the question was, whether the right of action for a penalty payable on breach of an agreement passed to the assignees of a bankrupt, and that question turns upon considerations which are equally applicable to the case where death has taken place; because all rights which become vested in assignees upon bankruptcy devolve on representatives of a deceased person. It was held that in that case the right of action had passed to the assignees, inasmuch as it was in reality an action upon a contract to pay money, and as such formed part of the property of the bankrupt. The case was distinguished from that of an action for a breach of promise of marriage, which does not survive to the executor, because the breach does not operate to the injury of the estate of the deceased, but affects his personal feelings, and it is for that suffering that compensation in damages is sought. "Although," said Maule, J., in delivering his opinion, "a right of action for not marrying or not curing, in breach of an agreement to marry or cure, would not generally pass to the assignees, I conceive that

(a) *Wentworth v. Cock*, 10 A. & E., at p. 45.

(b) (c) *Stubbs v. Holywell Railway Co.*, L. R., 2 Ex., 311.

(d) 2 H. L. C., 579.

a right to a sum of money, whether ascertained or not, expressly agreed to be paid in the event of failing to marry or to cure, would pass. The agreement of the parties that money shall be paid as compensation makes, as it seems to me, the right to recover that money a part of the personal estate of the bankrupt" (a). On the same principle a right of action for a breach of the contract on an attorney's part to take due care would not pass to the executor, if only personal inconvenience to the deceased, *e. g.*, imprisonment, had been caused by the negligence; but it would be otherwise if damage to his property had been occasioned (b). With regard to the Illustration (b), it may be observed that, in the event of B having performed his promise by paying the price, but A not having painted the picture before his death, A's representatives would be bound to refund the amount paid, under Section 65. In the language of English law there would be a total failure of consideration.

Exception has been taken to the language of this section as laying down too broadly the liability of representatives, and as rendering them personally liable, even beyond the assets of the deceased, for his liabilities. But the section does not really bear this interpretation. It is dealing merely with the question as to what promises bind the representatives of the deceased, and what promises are rendered void by his death: it says nothing as to the *extent* to which in any instance the representative is bound, and this extent will be regulated, of course, by the well known rule that a representative is answerable, when answerable at all, only to the extent of the assets of the person represented (c).]

38. Where a promisor has made an offer of performance to the promisee and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract (1).

Effect of refusal to accept offer of performance.

(a) 2 H. L. C., at p. 622.

(b) *Chamberlain v. Williamson*, 2 M. & S., 415.

(c) Will. Ex., 1721.

Every such offer must fulfil the following conditions:—

(1). It must be unconditional (2):

(2). It must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do:

(3). If the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver (3).

An offer to one of several joint promisees has the same legal consequences as an offer to all of them (4).

Illustration.

A contracts to deliver to B at his warehouse, on the first March 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

[(1) Performance of a promise cannot, in general, be effected without the concurrence of the promisee, and if he fails to do everything necessary on his part, the promisor is not only discharged from liability for non-completion on his part, but is considered actually to have performed his promise. In *Startup v. Macdonald*, Rolfe, B., explained the matter as follows:

“In every contract by which a party binds himself to deliver goods, or pay money, to another, he in fact engages to do an act which he cannot completely perform without the concurrence of the party to whom the delivery or the payment is to be made. Without acceptance on the part of him who is to

receive, the act of him, who is to deliver or to pay, can amount only to a tender. But the law considers a party who has entered into a contract to deliver goods or pay money to another, as having substantially performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made" (a). If the promisee gives the promisor to understand that it is useless to tender anything less than what he wrongfully demands, the promisor is excused from making a tender (b).

(2) A debtor's offer to pay on having a receipt from his creditor is not an unconditional tender (c).

But a tender "under protest" is valid, because the protest does not impose any condition on the acceptance, but merely obviates the effect of payment as an admission (d). If the condition of payment be that the creditor shall admit that no more is due, such offer is not unconditional (e). Nothing can amount to an offer to perform, which, if completed or accepted, would not constitute a performance, and, therefore, an offer will not be made "at a proper time and place" unless it be in conformity with the rules laid down in Sections 46—50.

(3) This sub-section is merely the application of the general rule laid down in sub-section 2 to cases of sale. The promise in such a case is to deliver a particular thing, and the purchaser is entitled to a reasonable opportunity of seeing that the delivery offered by the vendor is such as to constitute a complete performance of the promise.

According to English law, in order to constitute a sufficient tender of money in payment, there must be either actual production of the money or express or implied dispensation of such production. Lord Mansfield considered that the production of the money was important as being likely to influence the creditor (f). A sufficient tender of money is not made if the money is locked

(a) 6 M. & G., at p. 610.

(b) *The Norway*, Brow. & Lush., 410.

(c) *Laing v. Meader*, 1 C. & P., 257.

(d) *Scott v. Uxbridge Ry. Co.*, L. R., 1 C. P., 596.

(e) *Evans v. Judkins*, 4 Camp., 156.

(f) Cited in *Finch v. Brook*, 1 Bing., N. C., at p. 257.

up in a box, nor of goods, if they are enclosed in a cask, which the other party is not allowed to open (a).

Further, the English law requires that the debtor, whose tender has been refused, should still continue ready and willing to pay on demand, and he must, in pleading tender, aver that he is still ready and willing, and must pay the money into Court (b). Under the present section it would appear to be sufficient for him to prove such a tender as met the prescribed requirements, in order to be entitled to judgment.

By Act XXIII of 1870 (the Indian Coinage Act), Section 12, no gold coin is legal tender in British India; by Section 13, rupees and half-rupees are legal tender, if the coin has not lost more than 2 per cent. in weight, and has not been clipped, filed, defaced or diminished, otherwise than by use. Quarter rupees and eighth of a rupee are legal tender only for the fractions of a rupee; by Section 14, various copper coins are legal tender only for the fractions of the rupee.

As to cases in which Government Promissory Notes are legal tender, see Act III of 1871, Section 15.

(4) An offer made to the promisee by one of several joint-promisors would similarly, it is submitted, have the same legal consequence as an offer by all.]

39. When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Effect of refusal of party to perform promise wholly.

Illustrations.

(a.) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A wilfully absents herself from the theatre. B is at liberty to put an end to the contract.

(a) *Isherwood v. Whitmore*, 11 M. & W., 347.

(b) *Dixon v. Clark*, 5 C. B., 365.

(b.) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night, A wilfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

[This section introduces the subject of breach of contract and of the effect of a breach by one party on the position of the other parties to the contract. In order properly to understand the purport of the section, it should be read along with Sections 51—55, in which the matter is dealt with in fuller detail. The notes to those sections explain the general result of the provisions of the Act in this respect.]

The first way in which a promise can be broken is where the promisor, before the time for performance has arrived, refuses to perform, or does something which necessarily renders it impossible that he should perform; as when a man, who has promised to deliver certain articles on a specified date, before that date either declares that he will not deliver them, or delivers them all or some of them to some other person in such manner as to be beyond his control, and thus incapacitates himself for performance of the entire contract. Whenever this occurs, the other party to the contract is entitled to put an end to it, and, as is provided by Section 75, to claim damages for any loss which he sustains through the non-fulfilment of the contract.

So far the section is in accordance with English law, under which an unqualified refusal by one party, while the contract is still wholly unperformed on either side, to perform his promise, may be treated by the other party as an immediate breach of the contract, for which an action lies. Thus, when the plaintiff had agreed to act as servant to the defendant from an appointed future day, and before that day the defendant refused to employ him, it was held that the plaintiff, immediately upon the refusal, was entitled to consider the contract as at an end (a).

The same rule was laid down in *The Danube Railway Co. v.*

(a) *Hochster v. De La Tour*, 2 E. & B., 678.

Xenos (a). In a case (b) where defendant, having promised to marry plaintiff on the death of A, repudiated his promise during the lifetime of A, it was held that an action for the breach lay during A's lifetime. "The promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." On the other hand, the promisee may, if he pleases, "treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it."

Where defendant, charterer of a ship, told the master that he should not fulfil his promise of providing a cargo, but the master still insisted on its fulfilment, until, before the appointed day, a war broke out, which made it illegal for the defendant to procure a cargo; it was held, that the master not having treated the defendant's refusal as a breach of the contract before the contract was discharged by the declaration of war, no breach had occurred, and that, accordingly, the defendant was not liable to an action (c).

The promisee has no right to demand before the time whether the promisor will perform his contract. In *Ripley v. McClure* (d), it was held that a mere refusal to perform, declared beforehand,

(a) 31 L. J., C. P., 84. See other cases in *Cutter v. Powell*, 2 Smith's L. C., 37.

(b) *Frost v. Knight*, L. R., 5 Ex., 322; *ib.*, L. R., 7 Ex., 111.

(c) *Avery v. Bowden*, 25 L. J., Q. B., 49; 5 E. & B., 714.

(d) 4 Ex., 345.

may be retracted, but if it remains down to the time of performance unretracted, the promisee is entitled to treat it as a breach. The present section apparently makes "a refusal to perform" at any time a ground of avoidance. The question, according to the English cases, is, whether the conduct of the promisor evinces an intention absolutely to abandon the contract. Insolvency on the promisor's part does not by itself entitle the other party to treat the contract as abandoned, nor does default as to one instalment, where the contract is to be performed by several instalments; but where defendant undertook to deliver straw periodically in certain quantities, receiving payment on each delivery, and plaintiff refused to pay for the loads as delivered, it was held that defendant was entitled to treat the contract as abandoned, and, therefore, was not liable for ceasing to perform his part (a). The same principle was applied in other cases (b), the question being whether the insolvency of a purchaser and his refusal to pay one instalment amounted to evidence of his having abandoned the contract, and, therefore, justified the other party in cancelling it.

Up to this point the section involves no divergence from English law. Its language, however, allows of its being applied to another class of breaches, such, namely, as take place after the contract has been partially performed, and the Illustrations show that it is the intention of the Legislature that it should be so applied. Here the section differs very materially from the English law. It is obvious that whenever, in the performance of a contract, either party fails to carry out his promise in a particular, however small, he so far has disabled himself from performing his promise "in its entirety." To take Illustration (a), when A failed to sing on the 6th night, it had become impossible that her contract "to sing two nights in every week for the next two months" should be completely performed. The rule of English law in such cases is perfectly distinct, though it has sometimes been obscurely expressed, and difficulties have arisen in its application in particular instances. It considers, in

(a) *Withers v. Reynolds*, 2 B. & Ad., 882.

(b) *Bloomer v. Bernstein*, L. R., 9 O. P., 588; *Morgan v. Bain*, L. R., 10 C. P., 15.

each case, whether the breach has been such as to go to the essence of the contract, and to render the whole nugatory and valueless; or whether it has been such that the contract may still, though in a degree more or less modified, be substantially carried out. In the former case it allows the aggrieved party to avoid the contract; in the latter, it compels him to go on with the contract and to seek compensation for any loss which he may have sustained in an action for damages. A partial failure to perform, accordingly, does not, if from its nature compensation can be made for it in damages, render the contract voidable (a). Thus, where the plaintiff contracted to supply as many cargoes of coal as could be carried by the defendant's ship to a certain place during nine months, and the defendant contracted to send the vessel and take the coal, it was held that the defendant was not entitled to leave off sending the vessel merely because the plaintiff had sent some coal not equal to sample and because he had delayed the vessel in loading. In *Hoare v. Rennie* (b), the defendant bought of the plaintiff iron to be shipped in equal portions in each of the months of June, July, August and September: the plaintiff shipped far less than the agreed quantity in the first month: it was held that the defendant was justified in refusing the smaller quantity and any quantity subsequently tendered, as the plaintiff had substantially failed to perform his contract. This case has been much questioned and can only be supported on the ground that time was considered of the essence of the contract. In *Simpson v. Crippin* (c) the facts were to all intents identical, but the Court held that there was no sufficient reason why damages would not be a compensation for the breach of the plaintiff, and why the defendant should be at liberty to annul the contract: because the plaintiff has broken his contract first, it does not follow that he cannot sue for any breach subsequently committed by the defendant.

So also in a subsequent case (d) the defendant contracted to sell to the plaintiffs 250 tons of pig-iron at 56s. a ton, half to be

(a) *Franklin v. Miller*, 4 A. & E., 599; *Jonassohn v. Young*, 32 L. J., Q. B., 385.

(b) 29 L. J., Ex., 73. (c) L. R., 8 Q. B., 14.

(d) *Freeth v. Burr*, L. R., 9 C. P., 208.

delivered in two, and the remainder in four, months, and the payment of their value to be made 14 days after delivery of each parcel. The delivery of the first 125 tons was not completed for nearly six months in spite of urgent demands by the plaintiffs. On demand by the defendant for the price of the quantity delivered, the plaintiffs refused to pay, claiming a right to set off the loss which they had sustained from the necessity they were put to of buying other iron owing to defendant's default; but the plaintiffs notwithstanding this urged the delivery of the second parcel. The defendant treated the refusal to pay as a breach and an abandonment of the contract by the plaintiffs, and declined to deliver the second parcel. The plaintiffs thereupon sued the defendant for damages from the breach of contract on his part; it was held that the mere refusal to pay for the first parcel did not, under the circumstances, constitute an abandonment of the contract, and that the plaintiffs were entitled to damages for the breach.

Lord Coleridge, C. J., observed: "The question is whether the fact of the plaintiffs' refusal to pay for the 125 tons delivered was such a refusal on the part of the purchasers to comply with their part of the contract as to set the seller free and to justify his refusal to continue to perform it. This certainly appears, *viz.*, that there was an extension, by mutual consent, of the time for the delivery of the iron from December, 1871, to May, 1872, with constant pressure on the one side and excuses and resistance on the other. I mention that because it is important to express my view that, in cases of this sort, where the question is whether the one party is set free by the action of the other, the real matter for consideration is, whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. There has been some conflict amongst them. But I think it may be taken that the fair result of them is as I have stated, *viz.*, that the true question is, whether the acts and conduct of the party evince an intention no longer to be bound by the contract. Now, non-payment on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to

abandon the contract and set the other party free. That is the true principle on which *Hoare v. Rennie* was decided, whether rightly or not upon the facts, I will not presume to say. Where, by the non-delivery of part of the thing contracted for, the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract. That is the ground upon which it is said in *Jonassohn v. Young* that that case may be supported. In *Withers v. Reynolds* there was an express refusal by the plaintiff to perform the contract: and Patteson, J., says: 'If the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw: but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract.' Wightman, J., certainly, and Crompton, J., by inference, in *Jonassohn v. Young*, both uphold that case upon the principle on which I rely. The principle to be applied in these cases is, whether the non-delivery or the non-payment amounts to an abandonment of the contract or a refusal to perform it on the part of the person so making default."

Keating, J., observed: "It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract. Non-payment is an element. But, looking at all the circumstances of this case,—a rising market; a failure on the part of the defendant to deliver the iron according to the terms of the contract; a series of deliveries in small quantities long after the times for delivery provided for by the contract; and a refusal on the part of the plaintiffs to pay for the iron delivered, not only accompanied by remonstrances, but with a requisition to the seller to fix a day for the delivery of a certain quantity;—I do not think they show an intention on the part of the plaintiffs to abandon the contract. As upon the facts there appears to have been not only no absolute refusal to perform the contract by the plaintiffs, and, what is important, no evidence of inability on their part to perform it, I think the defendant had no right to treat

the contract as rescinded and to refuse to deliver the remainder of the iron."

On the other hand, if the breach is of such a character that damages will not properly compensate for it, the aggrieved party is entitled to avoid the contract. Thus, in the case of *Bradford v. Williams* (a), the contract was for the continuous employment of a ship, and during the continuance of the contract, the charterers refused to load the ship according to the agreed terms. The owner, thereupon, elected to rescind the charter-party. On being sued by the charterers he pleaded their previous breach of contract, and it was held to be a good plea, because 'no cross-action for damages would have fully compensated him, and, that being so, he was justified in his refusal to work any longer under the charter-party.' See also *McAndrew v. Chapple* (b) and *Jeston v. Key* (c).

The justice of this rule is obvious. A party to a contract may have performed it in every respect except one unimportant particular, and ought not on account of it to lose the benefit of the entire contract. The right way to treat such a breach is, not to render the entire bargain voidable at the pleasure of the other party, but to allow the parties to adjust in a separate proceeding any loss which the breach has occasioned. It is only where something has been done or has occurred, which goes to the root of the contract, and for which damages, accordingly, would be no proper compensation, that the contract ought to be set aside.

This distinction appears to have been abandoned in the present Act, except so far as Section 55 provides for breach of a contract as to time, when time is not of the essence of the contract. In the case of any other breach by one party, the other will, it is submitted, be entitled to avoid the contract: though, if he does, he will be bound to restore, so far as is possible, any benefit which he has received under it. Notwithstanding this provision, the rule is likely, in many instances, to produce hardship, and the policy of this departure from English law may well be questioned.

(a) L. R., 7 Ex., 259. (b) L. R., 1 C. P., 643. (c) L. R., 6 Ch., 610.

It is to be observed that this section refers to the case where a party has refused to perform or disabled himself from performing his contract. The 14th Section of the Specific Relief Act, on the other hand, refers to the case where a party to a contract is unable to perform the whole of it, meaning apparently a case where the inability is not caused by his own fault. If, under such circumstances, the part left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, specific performance of so much of the contract as can be performed may be directed, compensation in money being awarded for the deficiency. Failing these conditions the party in default cannot obtain specific performance, but he may, at the suit of the other party, be directed to perform what he can perform (Section 15).

The effect of acquiescence in a breach, and the class of facts which evidence it, are the same as those in the case of waiver of fraud—as to which, see note to Section 19.]

BY WHOM CONTRACTS MUST BE PERFORMED.

40. If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it.

Person by whom promise is to be performed.

Illustrations.

(a.) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B, or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b.) A promises to paint a picture for B. A must perform this promise personally.

[Section 37 having declared generally the duty of performance by the promisor, the present section goes on to specify the cases in which the contract must be performed personally by the pro-

misor, and those in which he or his representative may employ an agent for the purpose. See note to Section 37, also Sections 190 and 191, for cases where an agent may delegate his authority.]

41. When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Effect of accepting performance from third person.

[The principal debtor is discharged if his agent or his surety pay the debt; and payment by a stranger, without prior authority, may be adopted by the debtor, even after the suit is commenced, and pleaded in discharge (a). But such payment, without prior authority or subsequent adoption, has been held in England not to discharge the debtor (b). This rule is contrary to the maxim of the Civil law, "*debitorem ignarum, seu etiam invitum, solvendo liberare possumus*;" and its soundness has been questioned in the English Courts (c).

The doubt which exists on the point under the English law is removed by the present section. Acceptance by the promisee of performance from any person whatsoever precludes him from subsequently enforcing it against the promisor.

It has been held that, if the payer and the creditor cancel the payment before it is ratified by the debtor, the debt remains undischarged (d). Where S, attorney for defendant, whose authority had, unknown to him, been revoked, paid plaintiff a sum on account of his claims against defendant, and afterwards, on finding that he had no authority, requested plaintiff to repay the sum, and the plaintiff, having done so, sued the defendant for the debt,—it was held that he was entitled to recover. The ground of the decision in this case was, that the creditor could cancel his acceptance of the payment by a third party at any time before ratification by the debtor.]

(a) *Simpson v. Eggington*, 24 L. J., Ex., 312.

(b) *Jones v. Broadhurst*, 9 C. B., 173.

(c) *Cook v. Lister*, 32 L. J., C. P., 121; see *Cumber v. Wane*, 1 Smith's L. C., 301.

(d) *Walter v. James*, L. R., 6 Ex., 124.

42. When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and, after the death of any of them, his representative jointly with the survivor or survivors, and, after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

[Under the English Common Law the liability on a joint contract devolves on the surviving joint-debtor or his representatives, so that, where one partner of a firm dies, the creditors of the firm can proceed only against the survivors (*a*); but Equity, considering the contract as joint and several, allows the creditor in such cases to proceed against the estate of the deceased partner. The effect of this section and the 45th is to confer on joint promisors and their representatives the same rights and liabilities as they would have in the Court of Chancery. As to the liabilities of partners, see Chapter XI.]

43. When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one of such joint promisors to perform the whole of the promise (1).

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract (2).

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

(*a*) *Richards v. Heather*, 1 B. & Ald., 29.

Explanation.—Nothing in this section shall prevent a surety from recovering, from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations.

(a.) A, B and C jointly promise to pay D 3,000 rupees. D may compel either A or B or C to pay him 3,000 rupees.

(b.) A, B and C jointly promise to pay D the sum of 3,000 rupees. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts. C is entitled to receive 500 rupees from A's estate, and 1,250 rupees from B.

(c.) A, B and C are under a joint promise to pay D 3,000 rupees. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive 1,500 rupees from B.

(d.) A, B and C are under a joint promise to pay D 3,000 rupees, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

[(1) The effect of this provision is, that a joint promise is presumed to be *joint* and *several*. The English rule of law, irrespective of pleading technicalities, might be expressed in the same way; for although it is true that, where there are several promisors, they are *prima facie* liable jointly and not severally, yet, if one is sued separately and does not plead in abatement, he becomes responsible for the entire debt, and he cannot plead that he did not promise (a); and even where joint contractors have been sued jointly, and judgment has passed against them, the amount of the judgment may be enforced against one separately; so that each may, whether the suit be brought against him alone or against all, become ultimately liable for the whole debt (b).

This section merely allows the promisee to sue one or more of several promisors in one suit; and so, practically, prohibits a defendant in such a suit from objecting that his co-contractors

(a) *Abbot v. Smith*, 2 W. Bl., 947; *Cross v. Williams*, 31 L. J., Ex., 145.

(b) *Bird v. Randall*, 1 W. Bl., 387.

ought to have been sued with him. It does not convert into a joint and several promise every joint contract, because it makes, in the absence of special agreement, every joint contract enforceable against any one of two or more joint promisors. A judgment obtained against one or more of several joint contractors operates as a bar to a fresh suit against the others (*a*).

(2) As regards the promisee, each co-promisor is responsible for the whole amount of his promise; but as between themselves, joint promisors are entitled to have the burden equally distributed, unless the contract is inconsistent with such right, as where each engages to be bound in a different sum. See Section 147. The right of contribution thus conferred can, no doubt, under the provisions of Section 42, be enforced against the representatives of a deceased co-debtor. It does not, however, follow that each will have to pay an equal sum in any event, for it may happen that one makes default altogether in his contribution, in which case the remaining joint-debtors will have to bear the whole loss in equal shares, to the extent, that is, of their respective obligations. This rule prevails in the Court of Chancery (*b*). At Common Law, on the other hand, a joint-debtor who has discharged the whole debt can, in no case, recover from a co-debtor more than his aliquot part of the whole, regard being had to the number of the joint-debtors (*c*). In this case, again, the Act has adopted the rule applied in Chancery. See Sections 146-147. Illegality affects the right to contribution in the same manner as it does other rights arising out of the contract, and there is, therefore, no contribution among wrong-doers (*d*).]

44. Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

Effect of release of one joint contractor.

(*a*) *Roop Lall Mullick v. Rajendro Narain Moonshee*, 1 C. L. R., 448.

(*b*) *Mayor of Berwick v. Murray*, 26 L. J., Ch., 201.

(*c*) *Batard v. Hawes*, 2 E. & B., 287.

(*d*) *Merryweather v. Nixan*, 2 Smith's L. C., 481.

[According to the theory of English law, the obligation in a contract is entire, and, therefore, the release of one co-debtor puts an end to the whole contract (a), although the obligation be joint and several, unless, in the instrument of release, the rights of the creditor against the other co-debtors are expressly reserved (b). Equity has contrived to evade the stringency of this doctrine by construing documents, which purport to release one of several co-debtors, as covenants not to sue, and thus preserving the creditor's rights against the other co-debtors: such a release is not allowed to affect rights of contribution as between the co-debtors. Nor will it do so under the present section. See Sections 134, 135 and 138, and notes thereto.]

45. When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration.

A, in consideration of 5,000 rupees lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and, after the death of C, with the representatives of B and C jointly.

[This section lays down the same rule with regard to the interest of joint promisees as the 42nd does with regard to the liabilities of joint promisors. In neither case is the law of survivorship to prevail. Where five contractors jointly contracted to build a harbour, the building of which would take at least five years, and soon afterwards one of them died,—it was held that his estate was entitled to share in the profits of the contract;

(a) Co. Lit., 232 a.

(b) North v. Wakefield, 13 Q. B., 536.

and that those profits were to be the actual profits ascertained when the contract was completed, and not by valuation or by sale of the contract (a). It seems that the section is intended to preserve the English rule, which necessitates a joinder of all the joint promisees in an action on the joint promise. But the section is silent as to the effect of payment to one of several promisees. According to English law, a release by one of several joint promisees discharges the debt as against all: thus, in *Wallace v. Kelsall* (b), to an action by three plaintiffs for a joint demand, the defendant pleaded discharge by one of them, and it was held that the defence was good without alleging any authority from the other two plaintiffs to give this discharge; and the same principle has been applied here (c).]

TIME AND PLACE FOR PERFORMANCE.

46. Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Time for performance of promise, where no time is specified and no application to be made.

Explanation.—The question ‘what is a reasonable time’ is, in each particular case, a question of fact.

[The Act contains no general statement as to the point whether, in cases where no date for performance is fixed and nothing is said about it in the contract, it is the duty of the promisee to demand performance or of the promisor to perform without such demand. Section 93 provides expressly that, in cases of sale, it shall be the duty of the purchaser of goods, in the absence of special agreement, to apply for delivery; and from Section 48 it would appear that, where a day is fixed for performance, and the promisor has not undertaken to perform without application, it

(a) *McClellan v. Kennard*, L. R., 9 Ch., 336.

(b) 7 M. & W., 264.

(c) *Krishnavar Ramchunder v. Manaji Bin Sagaji*, 11 Bom., 166.

is the duty of the promisee to demand performance. But in other cases, it is submitted, that the matter must be governed by the English rule, that the obligation, and, therefore, the cause of action, is complete without proof of demand having been made by the promisee. The present section, however, seems to remove an undoubted hardship of the English rule by interposing a reasonable time during which the promise is to be performed, whereas, under English law, an action lies for a debt immediately on its becoming due.

Evidence of circumstances attending the sale has been held to be admissible in determining what is a reasonable time. Thus, in *Ellis v. Thompson* (a), where there was a sale of lead to be shipped and delivered, evidence was admitted to show that the defendant had, before the sale, asked whether the lead was ready for shipment, and had been informed that it was; and it was held that he was relieved from the obligation of receiving delivery by reason of a long delay in shipment (b). So, a contract by a manufacturer to furnish certain goods "as soon as possible" means that they are to be delivered "within a reasonable time," regard being had to the surrounding circumstances of the case (c). A contract to do a thing "immediately" is to be similarly construed (d). So, where a charter-party was made for loading coal at a particular colliery, and both parties were aware at the time that the colliery was not at work, but expected to be at work in a short time,—it was held that the freighter was not liable for the delay in loading, and it was sufficient if he loaded within a reasonable time after the colliery got to work. But, where there is no such common knowledge of an impediment to the performance, the time must be reckoned with regard to ordinary circumstances; and the occurrence of some fortuitous impediment will not excuse the promisor (e). As to subsequent impossibility, see Section 56.]

(a) 3 M. & W., 445.

(b) *Harris v. Dreesman*, 23 L. J., Ex., 210.

(c) *Attwood v. Emery*, 1 C. B., N. S., 110.

(d) *Pybus v. Mitford*, 2 Lev., 77.

(e) *Adams v. Royal Mail Company*, 5 C. B., N. S., 492.

47. When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Time and place for performance of promise where time is specified and no application to be made.

Illustration.

A promises to deliver goods at B's warehouse on the 1st January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it; and they are not received. A has not performed his promise.

[This section applies to cases where the promise is to be performed at a place which may or may not be fixed, on a certain day and without any demand being made by the promisee, and directs at what time during the day the performance is to take place. It is to be during the usual hours of business. This is an amendment of the Common Law, which distinguishes between cases where the thing is to be done *anywhere*, and those where it is to be done at a *particular place*. In the former case a tender at a convenient time before midnight is sufficient; in the latter it must be before sunset, because it is the duty of the promisee to attend (a). Under this section the tender must, under any circumstances, be during the usual business hours.

As to what is "the place at which the promise ought to be performed," see Sections 49 and 94.]

48. When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for per-

Application for performance to be at proper time and place.

(a) Co Lit., 202a; *Startup v. MacDonald*, 6 M. & G., 593.

formance at a proper place and within the usual hours of business.

Explanation.—The question ‘what is a proper time and place’ is, in each particular case, a question of fact.

[Application by the promisee for performance, like offer of performance by the promisor, must be so made as to give reasonable convenience to the other party.

As to what is the proper place, see Sections 49 and 94.]

49. When a promise is to be performed without application by the promisee, and no

Place for performance of promise, where no application to be made and no place fixed.

place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the perform-

ance of the promise, and to perform it at such place.

Illustration.

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

[In the ordinary case where the promisee is entitled to have the promise performed without making any previous demand, the promisor must, if no place is fixed for performance, seek the promisee out. The rule is thus stated in Co. Lit., 210 b. “If the condition of a bond or a feoffment be to deliver twenty quarters of wheat or twenty loads of timber or such like, the obligor or feoffor is not bound to carry the same about and seek the feoffee, but the obligor or feoffor before the day must go to the feoffee and know where he will appoint to receive it, and *there* it must be delivered.”

This is qualified by the duty imposed on the promisee of appointing a “reasonable place.” A very important qualification to this, in the case of goods sold, is introduced by Section 94.]

Performance in manner or at time prescribed or sanctioned by promisee.

50. The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Illustrations.

(a.) B owes A 2,000 rupees. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.

(b.) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B, respectively, of the sums which they owed to each other.

(c.) A owes B 2,000 rupees. B accepts some of A's goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d.) A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

[The Illustrations indicate four different ways in which a debt may be paid, if the creditor so please. Another common mode of payment is when the creditor desires the debtor to pay the money to some third person: another, where the debtor agrees to give a promissory note or to accept a bill for the amount.

As, for instance, to an agent; but payment to an agent, who is, to the payer's knowledge, not authorized to receive it, is not equivalent to payment to the principal (a).

As to Illustration (b), set-off can, of course, be pleaded in an action for the debt without showing any consent on the part of the plaintiff. See C. P. C., Section 111.]

PERFORMANCE OF RECIPROCAL PROMISES.

51. When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.

(a) Mackenzie, *Lyall v. Shib Chunder Seal*, 12 B. L. R., 360.

Illustrations.

(a.) A and B contract that A shall deliver goods to B to be paid for by B on delivery.

A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery.

B need not pay for the goods, unless A is ready and willing to deliver them on payment.

(b.) A and B contract that A shall deliver goods to B at a price to be paid by instalments, the first instalment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first instalment on delivery.

B need not pay the first instalment, unless A is ready and willing to deliver the goods on payment of the first instalment.

[This section, the 52nd and the 54th, deal with three classes of contracts which are distinguished from each other by the relation which the reciprocal promises contained in them bear to one another. "There are," said Lord Mansfield, "three kinds of covenants: 1, such as are called mutual and independent, where either party may recover damages from the other for the injury he may have received by a breach of the covenants in his favor, and where it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff; 2, there are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till this prior condition is performed, the other party is not liable to an action on his covenant; 3, there is also a third sort of covenants which are mutual conditions to be performed at the same time, and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered has fulfilled his engagement and may maintain an action for the default of the other; though it is not certain that either is bound to do the first act" (a). In the first of these three classes each party relies on the promise of the other; neither is entitled to demand antecedent performance, or even to require that the other should be ready and willing to perform his part. In the second class one of the parties has the security of performance on the other side before he can be called upon to perform his promise. In the third class, which is

(a) *Jones v. Barkley*, 2 Doug., 684.

that dealt with in this section, each party has the security of concurrent performance on the other side : neither is bound to perform his promise, unless the other is at the same time ready and willing to perform his part of the contract. Contracts of sale, where credit is not given and no time is fixed for payment or delivery, are of this nature : the sale and the payment are intended to be contemporaneous acts. Where, therefore, to an action for the purchase-money of certain mines, it was pleaded that the plaintiff "never has been at any time ready and willing to convey the same to the defendant according to the agreement," the plea was held good (a). And where there is a series of reciprocal promises, to be simultaneously performed, each party must, on each occasion, be ready and willing to perform his promise : and a refusal to do so by one party would, under English law, as under the present Act, justify the other party in non-performance. Thus, in *Withers v. Reynolds* (b), there was a contract by defendant to deliver three loads of straw in a fortnight, the plaintiff agreeing to pay so much "for each load of straw so delivered." This was held to mean that each load was to be paid for on delivery, and a refusal to pay on any one occasion justified a refusal to deliver. So, also, where it was agreed that A should sell to B certain lands, with the coal mines underneath, and that B should buy from A all the coal he might require, it was held that A could not sue B for not buying the coal, without averring his readiness and willingness to buy the land (c).

As to what constitutes "readiness and willingness" to deliver shares, see *Imperial Banking and Trading Company v. Atmaram Madhavji* (d) and *Imperial Banking and Trading Company v. Pranjevandas Hurjeewandas* (e).]

52. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and where

Order of performance of reciprocal promises.

(a) *Marsden v. Moore*, 4 H. & N., 500.

(b) 2 B. & A., 882.

(c) *Bankart v. Bowers*, L. R., 1 C. P., 484.

(d) 2 Bomb., 260.

(e) *Ibid*, 272.

the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations.

(a.) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.

(b.) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

[Having now disposed of cases in which the performance of the reciprocal promises is to be simultaneous, we come, in the present section, to the rule applicable where the acts to be done on either side by the parties to the contract are to follow each other in some settled order. This order is to be either (1) that expressly fixed by the contract; or (2), if no order be expressly fixed, that which the nature of the transaction requires: where, for instance, as shown in Illustration (b), A contracts to make over his stock to B at a fixed price, and B promises to give security, it is obvious that the whole object of the transaction is to secure A in parting with his stock, and this would be defeated if B did not give security before he got the stock. The nature of the transaction, accordingly, points to this order of performance, and A has as good a right to insist upon it as if it were expressed in the contract.

The proper order of performance being thus ascertained, it is the right of each party to withhold performance of any promise on his part, whenever any promise on the part of the other party, anterior to it in order of performance, remains unfulfilled. This is all that this section gives. It will be seen under Section 54 that failure to perform on the one side gives the other party a further right of the utmost importance; at present we have got no further than that a failure to perform a promise, anterior in order, on the one hand, justifies non-performance of a promise, subsequent in order, on the other.]

53. When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Liability of party preventing event on which contract is to take effect.

Illustration.

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

[This section introduces the subject of avoidance: a party may choose, not only to leave his part of a contract unperformed till something on the other side has been done; he may wish to bring it altogether to a close. He is entitled to do so in several instances: and, first, it is provided in the present section that, if the other party prevents him from performing, he is entitled to avoid the contract. The justice of this rule is obvious: the same principle is laid down, with regard to a promisee who neglects or refuses to afford the promisor reasonable facilities for performance, in Section 67.

The last clause of the section is repeated in the more general provision in Section 75.

As to the duty of a party who rightfully rescinds a contract, see Section 64.]

54. When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed, till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot

Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.

claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations.

(a.) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.

(b.) A contracts with B to execute certain builders' work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.

(c.) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.

(d.) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed, and A must make compensation.

[This section contains two more cases in which failure on the one side to perform a promise confers a right to avoid the contract on the other: for though the right of avoidance is not conveyed in express words, as in the preceding section, it is obvious that this is the intention. These cases are: (1) where the reciprocal promises are such that one of them cannot be performed till the other has been performed, as, for instance, where A promises to load goods at Madras in B's ship, and B promises to send his ship to Madras, and (2), where, as under Section 52 may often be the case, the reciprocal promises are such that performance of the one cannot be claimed till after performance of the other. In either of these two cases, a failure to perform by the one party justifies the other party in refusing

to perform his part of the contract, and entitles him to claim damages in respect of its non-performance: in other words he can avoid the contract and enjoy the privileges conferred by Section 75 on persons by whom contracts are rightfully rescinded. His right to do so, however, is modified in one highly important particular by the next succeeding section: for if the breach consists in not doing something by a specified time, it will not, except as provided by Section 55, confer a right of avoidance on the opposite party. As to the duty of a person who rightfully rescinds a contract, see Section 64.]

55. When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of failure to perform at fixed time, in contract in which time is essential.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of such failure when time is not essential.

If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the

Effect of acceptance of performance at time other than that agreed upon.

promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

[The object of this section is to modify the severity of the rule, which is practically the result of the preceding sections, *viz.*, that any breach on the part of one party to a contract justifies the other party in avoiding it. The section introduces a relief similar to that which has been afforded by English Courts of Equity in such cases : inasmuch as it necessitates regard being had to the intention of the parties, and it deals with the breach accordingly. If the intention was, as is generally the case with mercantile contracts, that time should be of the essence of the contract, the section provides that the breach shall be ground of avoidance ; the promise not having been performed at the date agreed, the whole contract has become nugatory, substantial performance has become impossible, damages would give no adequate compensation ; it is only right, therefore, that the aggrieved party should have the right of putting an end to the transaction if he chooses. The importance of this provision is obvious. Merchants base all their calculations on transactions which are to be performed at specified dates : goods are ordered to go to England in a particular ship, or to carry out a particular order, or to supply a particular demand. If any delay occurs, the whole scheme is frustrated. The aggrieved party consequently has the right of avoidance. It must be observed, however, that the entire contract does not become voidable, but only so much of it as is unperformed at the specified date.

The cases in which, time being of the essence of the contract, a party is prevented by inevitable accident from performing his part within the stipulated time, must, it is apprehended, come under this section : the result being that the contract is voidable at the option of the other party, and not wholly void, as it would be if the case were treated as governed by the following section. According to the English authorities, the right of avoidance arises only if the default in performance within the time given goes to the root of the consideration, and cannot be compensated in damages. By a charter-party it was agreed that a vessel should proceed to a certain port and there load for the charterers. On her way she

got on the rocks, and the jury found that the time necessary for getting her off and repairing her so as to be a cargo carrying ship, was so long as to make it unreasonable for the charterers to supply the agreed cargo, and that the delay was so great as to put an end in a commercial sense to the commercial speculation entered upon by the ship-owner and charterers. The charterers were accordingly held to be absolved from their obligation to furnish a cargo (a). On the same principle a contract between the plaintiff, a singer, and the defendants, owners of a theatre, was held to be voidable, the plaintiff having been prevented by sickness from taking her part at the stipulated time. Her failure to do so, though not exposing her to an action for damages, was deemed so important as to go to the root of the consideration. The defendants were therefore free from all obligation (b).

On the other hand, there are many contracts in which the exact date of performance is an altogether subsidiary matter; and in such cases the interests of the parties are best consulted by the provision that, if one party to the contract fails to perform his part by the specified time, his failure shall be ground, not for avoiding the contract, but for such compensation as the injury occasioned by it to the other party may seem to call for. In such cases acceptance by the promisee of performance at a time other than that agreed is deemed a waiver of any claim for damages, unless notice is given at the time of such acceptance of the promisee's intention to claim them.

It is submitted that the relief afforded by this section in cases in which the breach consists in failure to perform something at or before a specified date, might, with advantage, be extended to all cases in which the breach is of such a nature as not to go to the root of the transaction, or, in the language of the section, "to be of the essence of the contract." Just as there are cases in which time is not of the essence of the contract, so there are cases in which quality, or quantity, or place, or mode of performance, is not of the essence

(a) *Jackson v. Union Marine Insurance, Co.*, L. R., 8 C. P., 572; affirmed in L. R., 10 C. P., 125.

(b) *Poussard v. Spiers*, 1 Q. B. D., 410. Compare *Bettini v. Gye*, *ib.*, 83.

of the contract. In these cases the proper remedy would appear to be one analogous to that indicated in the present section ; an amendment of the Act in this respect would certainly bring it into harmony with the English law on the subject, and would, it is believed, conduce to a more equitable adjustment of the rights of contracting parties than that provided by the section in its present form. See note, Section 39.]

Agreement to do impossible act, void.

56. An agreement to do an act impossible in itself is void (1).

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful (2).

Contract to do impossible act, or one which afterwards becomes impossible or illegal, when void.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know, to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Compensation for loss on non-performance of act known to be impossible or unlawful.

Illustrations.

(a.) A agrees with B to discover treasure by magic. The agreement is void.

(b.) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(c.) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practise polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.

(d.) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e.) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

[(1) This section might, perhaps, with more propriety, have been placed among the group of Sections 24—30, which deal with void agreements. Contracts which become void owing to the event on which they are contingent becoming impossible, have been already dealt with in Sections 32, 34, 35, and 36.]

Whether the impossibility is known to the parties or not, it equally makes the agreement void. In the one case, there being obviously no intention of performance on the one side, and no expectation of it on the other, the elements of an agreement are wanting. Thus, where a charter-party was executed on 15th March containing a covenant that the ship should sail on or before the 12th February, it was held that the covenant, being impossible at the time when the charter-party was made, must be regarded as void (a).

Where the impossibility is unknown to both parties at the time of the agreement, there is, in reality, a common mistake as to a matter of fact, Section 20. Upon the sale of a cargo of goods, supposed to be on its voyage, but which, unknown to the parties, was lost, it was held that the contract imported the condition that the cargo was then in existence (b). So, the sale of an annuity is considered to be impliedly conditional on the annuitant being alive, and, the life having in fact ceased before the sale, the contract was held void (c).

Where the impossibility is known to one and not to the other of the parties, there is necessarily fraud or misrepresentation on the part of the party who is aware of the impossibility: such cases are sufficiently provided for by the last paragraph of the section.

In order to render an agreement void, the act agreed to be done must be "impossible in itself," i. e., it must be absolutely and generally impossible, not merely impossible relatively to the person agreeing. An agreement by a pauper to pay Rs. 10,000 would be

(a) *Hall v. Cazenove*, 4 East, 477.

(b) *Couturier v. Hastie*, 25 L. J., Ex., 253; *Barr v. Gibson*, 3 M. & W., 390.

(c) *Pritchard v. Merchants' Life Assurance Soc.*, 27 L. J., O. P., 169.

impossible with reference to his resources; but it would not for that reason be void, because there is no inherent impossibility in such an agreement: the impossibility is accidental, arising out of his circumstances.

Care must, moreover, be taken to see, with reference to cases falling under this section, whether the terms of the agreement import not merely a promise to do a thing, but a promise that a certain thing shall, in any event, be done or happen; for there is then a warranty of the possibility of the thing, and the fact of its being impossible would not be a good plea to an action on the covenant. A man, for instance, may covenant that so many inches of rain shall fall: the mere fact of the rain being beyond human control would not in such a case exempt him from liability on his covenant. If he chooses to guarantee the happening of the event, he will be liable for damages for its non-occurrence.

A question may arise, with reference to the phrase "impossible in itself," whether the act must be "impossible" under all conceivable circumstances, or merely impossible with reference to the ordinary faculties and resources of mankind, and the ordinary means employed for attaining the end in view. Suppose, for instance, a contract to be to sail into a certain harbor and load there, and the defence to be that the bar of the harbor had silted up and that it was "impossible" to sail in. The answer might be that, though, as matters stood, it was impossible, yet, if sufficient money were expended, the mouth of the harbor might be cleared, and that, therefore, the agreement could not be said to be impossible. But a Court would, no doubt, decide in such a case that the "impossibility" referred to was an impossibility of doing the thing in question with the ordinary means and appliances. In this way "impossible" has often been construed in English Courts as meaning "so difficult as to be practically impossible." "In matters of business," said Maule, J., "a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost. A man may be said to have lost a shilling when he has dropped it into deep water, though it might be possible, by some very expensive contrivance, to recover it" (a).

(a) *Moss v. Smith*, 9 C. B., at p. 103.

If, however, the act is practicable, the mere unreasonableness of it has always been held to be immaterial (a).

(2) According to English law a distinction is made between duties created by law and those created by the person's own contract, "where the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him;" as in waste, if a house be destroyed by tempest or by enemies, the lessee is excused.....But, "when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And, therefore, if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it" (b). This rule is, however, applicable only where the contract is positive and absolute and not subject to any condition, either express or implied.

The question, therefore, arises whether general words in a contract can be said to have been used with reference to the possibility of the particular contingency which happens. A man might by apt words bind himself that it shall rain to-morrow, or that he will pay damages (c). "There can be no doubt that a man may, by an absolute contract, bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance; and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor" (d). Thus, where in an action on a charter-party, not containing any exceptions for not proceeding to the port of loading, the master pleaded that he was prevented by contrary winds, the plea was held bad (e).

Impossibility arising by the act of God is sometimes said to

(a) *Vyse v. Wakefield*, 6 M. & W., at p. 456.

(b) *Paradine v. Jane*, Aleyn, 26.

(c) *Canham v. Barry*, 24 L. J., C. P., 106.

(d) *Baily v. DeCrespigny*, L. R., 4 Q. B., at p. 185.

(e) *Shubrick v. Salmond*, 3 Burr., 1637.

be an excuse for non-performance of a contract, but what is really meant is, that the contract does not cover the contingency which has actually happened, and, therefore, there is no breach. This principle was adopted in a case referred to in the last note, where, after a review of the authorities, the judgment proceeds:—

“These authorities seem to support the proposition, which appears on principle to be very reasonable, that, where a contract is made with reference to certain anticipated circumstances, and where, without any default of either party, it becomes wholly inapplicable to or impossible of application to any such circumstances, it ceases to have any application; it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made” (a).

On the same principle, contracts for personal service dependent on personal capacity,—as to write a book or paint a picture,—are conditional on the continuance of the ability, mental or corporal, to perform them. In *Robinson v. Davison* (b), the plaintiff claimed damages for a breach of a contract on the defendant's part to play at a concert, and the defendant pleaded that she was prevented by illness. The plea was held good. Bramwell, B., after remarking that the question was—What the original contract was, and whether it was a contract with or without a condition precedent,—says: “This is a contract to perform a service which no deputy could perform, and which, in case of death, could not be performed by the executors of the deceased; and I am of opinion that by virtue of the terms of the original bargain, incapacity either of body or mind in the performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement. Here they have not done so; and as they have been silent on that point, the contract must, in my judgment, be taken to have been conditional and not absolute.” The same point was discussed in *Hall v. Wright* (c) with regard to an action for a

(a) *Jackson v. Union Marine Insurance Company*, L. R., 8 C. P., at p. 581; *ib.*, 10 C. P., 125. See also *Taylor v. Caldwell*, 32 L. J., Q. B., 164.

(b) L. R., 6 Ex., 277.

(c) E. B. & E., 746

breach of promise to marry, to which the defence was raised that the defendant was afflicted with a dangerous disease and incapable of marriage without great danger to his life. Six Judges held that this was no defence, a minority of five holding the contrary opinion, which certainly seems more in accordance with the common sense of mankind. Pollock, C. B., and Bramwell, B., distinguished the contract of marriage from mercantile contracts by the circumstance that it is made conditional on the continuance of life and health, and compared it to a contract involving personal talent,—as, for instance, to write a book or paint a picture,—the non-performance of which would be excused by the writer becoming insane or the artist paralytic.

When agreements are made with reference to a certain thing, the promises on each side are avoided by its destruction. In *Taylor v. Caldwell* (a), the plaintiff undertook to provide a musical entertainment to be carried on in a certain hall, which the defendant was to provide. Before the appointed time the hall was burnt down. An action was brought by the plaintiff against the defendant for not providing the hall, and it was held that the latter was not liable because the contract was put an end to by the destruction of the hall. In *Appleby v. Myers* (b), the contract was for the erection of machinery by the plaintiff in a building belonging to the defendant. Whilst the work was in progress, the building was destroyed by fire. The Exchequer Chamber, reversing the decision of the Common Pleas, held, that the plaintiff was not entitled to compensation for his work, because the whole contract depended on the existence of the building, and the promises on each side were annulled by its destruction.

Where there was a contract to deliver a certain crop off certain land at a given price, and the crop, being destroyed, could not be delivered, it was held that the contract was subject to the condition that the parties should be excused if performance became impossible by the perishing of the agreed thing without default of the contractor, and that therefore he was free from all obligation (c).

(a) 32 L. J., Q. B., 164.

(b) L. R., 2 C. P., 651.

(c) *Howell v. Coupland*, 1 Q. B. D., 258. See, also, *Clifford v. Watts*, L. R., 5 C. P., 577.

But, according to section 86, if the property has passed to the buyer, he has to bear the risk. As this latter section would apply to a case in which the delivery had not yet taken place, the present section must be read qualified by it. Notwithstanding the destruction of the goods causing an impossibility of performing the contract by delivery of them, the contract still remains valid, and the buyer has to pay the price, provided at the time of the destruction the property had become vested in him. For the cases not embraced by the 86th Section, which refers to goods only, the Legislature has made provision by a declaratory section in the Specific Relief Act. The 13th Section of that Act declares that a contract is not wholly impossible of performance, because a portion of its subject-matter, existing at the time of making the contract, has ceased to exist at the time of the performance; and as an instance is given the case of a house destroyed by a cyclone the day after the contract of sale. Notwithstanding the destruction, the obligation of the purchaser still remains.

Where the circumstances which create the impossibility are within the knowledge of the party who is to perform, he is responsible. Thus, where defendants, coal-agents, agreed to load the plaintiff's vessel "with usual despatch," and an unusual delay in loading was occasioned by the fact of the defendants having three other vessels loading and ten other vessels waiting, whose turn was prior to that of the plaintiff's ship, the rule of the port being that an agent might load only three vessels at a time, the defendants were held responsible for the impossibility of loading, of which they were aware at the time of the contract (a).

If the impossibility is caused by the promisor himself (Section 39), or by the promisee (Section 67), the effect is to enable the other party to rescind the contract and sue for damages for its non-performance.

Contracts are generally made with reference to the law as then existing, and there must be very distinct evidence of intention to rebut that presumption. In *Baily v. De Crespigny* (b),

(a) *Ashcroft v. Crow Orchard Colliery Company*, L. R., 9 Q. B., 543.

(b) L. R., 4 Q. B., 180; *Mills v. East London Union*, L. R., 8 C. P., 79.

the defendant covenanted for himself and his assigns not to use certain land otherwise than in a given manner, and afterwards was compelled to convey the land to a railway company, who purchased under the power of an Act of Parliament: the company did use the land in a manner unauthorized by the covenant, and the plaintiff thereupon sued the defendant upon it. The defendant pleaded that performance of his covenant had become impossible by an act of law, and the Court held the defence good, observing that, "to hold the defendant responsible for the acts of such an assignee [as a railway company] is to make an entirely new contract," because the term "assigns" had a well-known meaning, and did not include purchasers who took under such circumstances as to leave the owner no option.

Subsequent illegality may be occasioned by some legislative change, which renders illegal what was previously lawful, or by a declaration of hostilities. The agreement is not void if the promisor has a choice of two modes of performing, one of which is illegal (Section 57). The Act makes no provision for alternative promises, one of which is possible and the other impossible. The Common Law rule is the same as that propounded by Section 58 with regard to promises, one branch of which is legal and the other illegal. If one thing becomes impossible, the promisor must perform the other (a). The contrary doctrine, laid down in *Laughter's case* (b), has been overruled. In *Barkworth v. Young* (c), Kindersley, V. C., said,—“that if the Court is satisfied, that the clear intention of the parties was, that one of them should do a certain thing, but he is allowed at his option to do it in one or other of two modes, and one of those modes becomes impossible by the act of God, he is bound to perform it in the other mode.” The promisor has an election, and his determination, once made, is final, for “where there is an election given by a contract, and the election is made, it is the same as if there had been no election; and the party making the election is absolutely bound to do that which he has elected to do” (d).]

(a) *DaCosta v. Davis*, 1 B. & P., 242.

(b) 3 Co., Pt. V, 22a.

(c) 26 L. J., Ch., 153.

(d) *Per Campbell, C. J., Brown v. Royal Insurance Society*, 28 L. J., Q. B., 277.

57. Where persons reciprocally promise, firstly to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Where there are promises to do things legal, and also other things illegal, the former are a contract, the latter a void agreement.

Illustration.

A and B agree that A shall sell B a house for 10,000 rupees, but that, if B uses it as a gambling house, he shall pay A 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

[This is an important qualification of the rule that the *whole* of the promise and the *whole* of the consideration must be legal as laid down in Sections 23 and 24. It is obvious that part of the consideration for A's sale of the house was the contingent payment of 50,000 rupees in case of its being used as a gambling house. See note to Section 24.]

In alternative promise, one branch being illegal, legal branch alone enforceable

58. In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration.

A and B agree that A shall pay B 1,000 rupees, for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

[See note to Section 57.]

APPROPRIATION OF PAYMENTS.

59. Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the

Application of payment where debt to be discharged is indicated.

discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations.

(a.) A owes B, among other debts, 1,000 rupees upon a promissory note, which falls due on the first June. He owes B no other debt of that amount. On the first June A pays to B 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b.) A owes to B, among other debts, the sum of 567 rupees. B writes to A and demands payment of this sum. A sends to B 567 rupees. This payment is to be applied to the discharge of the debt of which B had demanded payment.

[This and the two succeeding sections deal with a subsidiary question, which is often of considerable importance in connection with performance of contracts. When the thing to be performed is the payment of money, and there are more debts than one in respect of which the payment may be made, it frequently becomes material to decide to which of the debts the payment is to be appropriated. A creditor, for instance, may have several debts owing to him, one of which may not be enforceable because of the Limitation Act ; or one debt may be unsecured and another secured by a mortgage. In both instances the creditor will be anxious to appropriate the payment to the debt which he is least likely to realize. Three rules are laid down in these sections for determining to which debt any given payment is to be applied.]

In the first place, the option lies with the debtor, in making the payment, to say to which debt he intends it to be applied ; and his intentions on the subject may be indicated either expressly, or by the circumstances under which the payment is made. This right of the debtor cannot be affected by any refusal on the creditor's part to apply the payment according to the expressed will of the payer. If the creditor does not choose so to apply it, he must refuse it, and enforce his rights as the law allows him. The Illustrations give two instances of the way in which a debtor's intentions may be inferred from the circumstances of the payment. In the first case, the precise amount necessary to meet a debt of a special character is paid on the very day on which the debt becomes due : in the other, the precise amount demanded for a particular debt is sent in reply to the letter of demand. In these cases, therefore, the debtor is deemed to have directed the

appropriation. So, where a debtor owed two debts, one actually due, the other not yet due, but the latter was guaranteed by the debtor's father-in-law, and it was shown that discount was allowed by the creditor on a payment made, it was held that these facts sufficiently established the debtor's intention to appropriate the payment to the guaranteed debt (*a*).

The mere fact, however, of one debt being guaranteed and another not, raises no presumption that a payment is made in respect of the guaranteed debt (*b*).

A general payment made by one who is indebted in his own right and also in another right, as executor, for instance, is taken to be made in discharge of the debt due in his own right (*c*).

Where there is a composition by a debtor of so much paid in the pound, the creditor must apportion the payment rateably to all existing debts, and cannot devote it to those which are unsecured or unenforceable (*d*). When money belonging to the debtor comes into the creditor's hands without the debtor's knowledge, the debtor's right of apportionment remains until he has had an opportunity of exercising it (*e*).]

60. Where the debtor has omitted to intimate, and there are no other circumstances indicating, to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Application of payment where debt to be discharged is not indicated.

[If there has been no express or implied declaration of the debtor's intention, the creditor has the right of appropriating the payment; but this right does not arise till the debtor has had

(*a*) *Marryatts v. White*, 2 Stark., 101.

(*b*) *Plomer v. Long*, 1 Stark., 153.

(*c*) *Goddard v. Cox*, 2 Str., 1194.

(*d*) *Bardwell v. Lydall*, 7 Bing., 489.

(*e*) *Waller v. Lacey*, 1 M. & G., 54.

the opportunity of exercising his prior right. Thus, an attorney, having received, without his client's knowledge, money on his account for damages recovered, was held to have no right to appropriate the sum to debts which were barred by the Statute of Limitation. The creditor may make the appropriation at any time, nor is he bound by an intended appropriation till the debtor has been informed of it. Thus, in *Sinason v. Ingham* (a), the plaintiffs, who were bankers, had appropriated a particular payment by entries in their books: they were held at liberty to alter this appropriation subsequently, as it had not been communicated to the debtor. This is contrary to the rule of Civil law, according to which appropriation, whether by debtor or creditor, was necessarily made at the time of payment (b). The payment can be appropriated only to a "lawful debt, actually due and payable" by the debtor. A payment could not, therefore, be appropriated to a debt not yet due, or which arose out of a contract illegal or otherwise void. Where there is a valid contract, but the evidence of it is, for some particular reason, excluded or not forthcoming, or where, as provided in this section, the debt is barred by limitation, the creditor is at liberty to apply the payment to it if he chooses.]

61. Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

[The last of the three rules referred to in note to Section 59 is applicable when neither creditor nor debtor has exercised his right of appropriation. The payment is then appropriated to the earlier debt, that is to say, the first item on the debit side is to be discharged by the first item on the credit side. According

(a) 2 B. & C., 65.

(b) Clayton's case, 1 Mer., 585.

to English cases it seems that a general payment is first devoted to interest and then to principal, as far as it will go ; but the section applies it without exception to the earlier debt, omitting all mention of interest. If there is no distinction in time between the debts, the sum paid will be distributed proportionally. So, where a buyer was indebted to a broker for two parcels belonging to two different persons, and he made a general payment, larger than the amount of either demand, but less than that of the two together ; upon the broker becoming insolvent, it was held that such payment ought to be equitably apportioned between the two principals, leaving them to recover only the balance from the buyer (a).]

CONTRACTS WHICH NEED NOT BE PERFORMED.

Contracts changed, rescinded or altered need not be performed. 62. If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations.

(a.) A owes money to B under a contract. It is agreed between A, B and C, that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b.) A owes B 10,000 rupees. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract and extinguishes the old.

(c.) A owes B 1,000 rupees under a contract. B owes C 1,000 rupees. B orders A to credit C with 1,000 rupees in his books, but C does not assent to the arrangement. B still owes C 1,000 rupees, and no new contract has been entered into.

[Sections 39, 53, and 54 show how the conduct of one party to a contract may enable the other party to put an end to it if he chooses. We now come to consider another mode in which contracts may be terminated. This section indicates three ways in which a contract can be put an end to by agreement between the parties.

(a) *Favenc v. Bennett*, 11 East., 36 ; *S. Mooneappah v. Vencatarayadoo*, 6 Mad. H. C., 32 ; *Hirada Karibassapah v. Gadigi Muddappa*, *ib.*, 197

The first is by the substitution of a new contract, the process which is known to the civil law as "*novatio*." The first two Illustrations afford instances of the different forms which the process may take. There may be either a change in the parties to the contract, or in the nature of the obligation. In either case the original obligation is determined, and a new one is substituted for it. Thus, in Illustration (a), the original debtor is discharged and a new one accepted in his place, the original debtor, the creditor, and the new debtor being all parties to the transaction. Such an agreement frequently occurs upon a change in a firm, when the debts of the old firm are to be transferred to the new one, the creditor discharging the former from its liability in consideration of the acceptance of liability by the latter (a).

Again, the change may be in the person of the promisee, as in the ordinary case of an assignment of a debt. The English law on this topic owes its complication to the Common law rule that a chose in action cannot be assigned. This rule, which prevents the assignee gaining any right of action by virtue of the assignment, has not been followed in Equity. The circumstances, therefore, requisite for an assignment at law differ from those required in Equity. At law, an assignment, in order to discharge the debtor's liability to the original creditor and to create a liability in favor of the substituted creditor, can be effected only by an agreement between the three parties. The case is put thus in *Tatlock v. Harris* (b):—"Suppose A owes B £100, and B owes C £100, and the three meet, and it is agreed between them that A shall pay C the £100; B's debt is extinguished, and C may recover that sum against A." In Equity, on the other hand, an assignment of a debt is complete as between the assignor and the assignee without any communication with the debtor, and an order by a creditor, desiring his debtor to pay a third person, is complete as between creditor and debtor, although there has been no consent or concurrence on the latter's part to the agreement; for in Equity mere notice is held to be binding on the debtor (c).

(a) *Hart v. Alexander*, 2 M. & W., 484; *Rolfe, Bailey and Bank of Australia v. Flower, Salting, and Co.*, L. R., 1 P. C., 27.

(b) 3 T. R., 174.

(c) *McGowan v. Smith*, 26 L. J., Ch., 8.

The present section appears to be a reproduction of the Common law, to the exclusion of the equitable rule on the subject: nor is there elsewhere in the Act any provision as to the assignability of the rights of action under a contract. But it has long been an established law in this country that a chose in action is assignable (*a*).

Another form of substitution is that in which the creditor accepts a security of a different nature from the original one: thus, in Illustration (b), a mortgage is substituted for a simple contract-debt; so also bills, notes or cheques may be given for debts due on account; but generally they are given merely by way of security; and, therefore, if they are dishonoured, the creditor may still have recourse to the original debt, it not having been extinguished by the fact of his taking such security.

Although the terms of a contract have been reduced into writing, it may be shown from the conduct of the parties that they have adopted other terms in substitution for those stated in writing, provided that the contract is not one which must be in writing. A party to a contract who endeavours to enforce a verbal agreement so substituted for a written one must "show, not merely what he understood to be the new terms on which the parties were proceeding, but also that the other party had the same understanding—that both parties were proceeding on a new agreement, the terms of which they both understood" (*b*).

The parties may also agree "to rescind or alter" the contract; and the original contract need not, in such case, be performed. That which is substituted must be a "contract;" thus, an agreement which was for any reason unenforceable, could not be substituted for an existing contract.

The question, however, arises whether an "agreement" to substitute, rescind or alter, under this section, falls within the scope of section 25, so as to require to be supported by consideration. Where one contract is substituted for another, there may be said to be consideration, the acceptance of the new contract by the one party being the consideration for the abandonment of the original one by the other. But where the parties agree to

(*a*) *Kádarbácha Sáhib v. Rángasvámí Náyak*, 1 Mad. H. C., 150.

(*b*) *Darnley v. London, Chatham and Dover Ry. Co.*, L. R., 2 H. L., at p. 60.

alter or rescind a contract, it might be argued that the agreement in this case, as in others, should be supported by consideration. The English law on the matter is clear, though somewhat technical. It makes a distinction between matters occurring before breach, and those occurring after breach, of the promise. Before breach, a waiver, however made, may be pleaded in exoneration and discharge, and constitutes a good defence. After breach, a discharge can be effected only in two ways, *i. e.*, by a release under seal, or by what is termed "accord and satisfaction." In order to effect the latter mode of discharge, it must be proved that the promisee accepted something in satisfaction of the breach, which, in contemplation of law, is capable of being advantageous to him; it may be something performed, or it may be a new agreement made by the promisor, such new agreement being equally valid with the original. But, in the absence of consideration of this sort, no arrangement between the parties is binding. If, therefore, a creditor accepts Rs. 50 in satisfaction of a debt of Rs. 100, or if he accepts an invalid bond, the debtor is not discharged, because the creditor has not received anything which can be deemed to be advantageous to him. The strict effect of this rule has been evaded by regarding the slightest variety in the nature of the satisfaction accepted in lieu of the debt as beneficial to the creditor; thus, for example, the cases show that the acceptance of a bill of exchange for a sum less than the amount of the debt acts as a discharge, although the acceptance of a smaller sum in cash would not so operate.

Where the parties have, subsequently to the execution of a contract, agreed to vary it, specific performance can be decreed only with the variation.—Specific Relief Act, section 26, cl. (e).

The 92nd section of the Evidence Act must be read in connection with this section, as also the 49th section of the Registration Act, III of 1877. Where a contract is required by law to be in writing and has been reduced to writing, no effect can be given to oral evidence of an alteration of its terms, so as to substitute for the written an oral contract (a). But the mere asking by one party of the other for forbearance, and forbearance granted accordingly, does not alter the contract. The party

(a) *Noble v. Ward*, L. B., 1 Ex., 117; 2 *ib.*, 135.

granting it may recall it at any moment (a). One who alleges such an arrangement as to the mode of performance; as distinguished from actual variation of the contract, must show that he was ready and willing to perform the contract, otherwise he has to rely on a new agreement. Hence, where to an action for refusal to accept goods sold, defendant pleaded that plaintiff was not ready and willing to deliver according to the contract, and it was not shown that delivery was withheld in consequence of a request made by the defendant before the expiry of the agreed time, it was held that the action was not maintainable on the contract. Not being able to rely on his readiness and willingness to deliver according to the original contract, because he was not so ready and willing, he was logically driven to rely upon a subsequent request of the defendant, either as a proposed alteration of a term of the original contract, or as a request on which to hang a new contract to accept. The statute of frauds prevented him from enforcing such agreement without writing (b).

Neither in this Act, nor in the Evidence Act, is any mention of alterations of written agreements by one party without the consent of the other. Such alterations are usually placed in English text-books among the modes in which an agreement may be discharged, the rule being that any alteration of the document containing an agreement invalidates such agreement in the hands of the party who produces it and sues upon it, unless he can account for the alteration by showing that it was done by mistake or accident, or establish that it is immaterial (c).

The alteration of the date of a bill of exchange is held material; so, also, the addition to a promissory note of the words "interest to be paid at £6 per cent. per annum" (d).

An altered instrument is not, however, necessarily avoided for all purposes. An alteration in a deed of conveyance does not affect the right of property conveyed, although it prevents the covenantor who is responsible for it from suing on the cove-

(a) *Ogle v. Vane*, L. R., 2 Q. B., 275; *Hickman v. Haynes*, L. R., 10 C. P., 598.

(b) *Plevins v. Downing*, 1 C. P. D., at p. 226.

(c) *Master v. Miller*, 1 Smith's L. C., 796; *Chandrakant Mookerjee v. Kartikcharan Chaile*, 5 B. L. R., 103.

(d) *Warrington v. Early*, 2 E. & B., 763.

nant (a). The right of the person responsible for the alteration is alone affected by it, and therefore, if it is necessary to determine the rights of others, the instrument may be looked at, at least as evidence of the terms of the contract, if not as intrinsically binding between the parties. Thus, where in an action for work done by the plaintiff as a builder, it appeared that the work had been done on the terms of a document one condition of which was that the plaintiff should only recover for work for which the architect had given a certificate, and that the plaintiff had been paid for all work for which such certificate had been given, it was held that the plaintiff could not recover on a *quantum meruit*, although the document had, while the defendant was responsible for its custody, been altered in a material part, so that the defendant could not himself have sued upon it (b). The reason of the Common law rule is two-fold, namely, to guard against fraud, and to secure the identity of the instrument and prevent the substitution of another.]

63. Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Promisee may dispense with or remit performance of promise.

Illustrations.

(a.) A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

(b.) A owes B 5,000 rupees. A pays to B, and B accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c.) A owes B 5,000 rupees. C pays to B 1,000 rupees, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.

(d.) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A, without ascertaining the amount, gives to B, and B, in satisfaction thereof, accepts the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(a) *Master v. Miller*, 1 Smith's L. C., 796.

(b) *Pattinson v. Luckley*, L. R., 10 Ex., 330.

(e.) A owes B 2,000 rupees, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them a compensation of eight annas in the rupee upon their respective demands. Payment to B of 1,000 rupees is a discharge of B's demand.

[This section, so far as it applies to matters occurring before breach, is a reproduction of the rule of English law, that, before breach, a mere waiver may be pleaded in exoneration and discharge of a promise. The section is, however, obviously intended to cover the case where the matter of defence occurs after breach, and in this point it involves a departure from the English rule that after breach the right of action can be discharged only by a release under seal, or by accord and satisfaction, that is, an agreement to receive something instead of performance and the actual receipt of the thing so agreed.

According to English law, a release under seal discharges the cause of action, and moreover operates as an estoppel on the party executing it, so that he cannot avoid it even by showing that he has been under a mistake (a). It is not to be supposed that the Courts here would enforce the English rule of estoppel by deed (b).

The section does not expressly provide that a promisee who has remitted performance of a promise has precluded himself by so doing from subsequently enforcing it. But it is clear from the Illustrations that this is the intention.

Illustration (c) is an exemplification of the rule laid down in Section 41. For further illustrations of this section see note to Section 39.

The important point shown by the Illustrations given under this section is, that a remission of performance, or the acceptance of partial, in satisfaction of complete, performance, need not, in order to be binding against the person who so remits or accepts, be supported by consideration.]

(a) Leake on Contracts, p. 298 ; and see *Lee v. Lancashire and Yorkshire Railway Co.*, L. R., 6 Ch., 534, as to the distinction between a release and a mere receipt.

(b) *Param Singh v. Lalji Mal*, I. L. R., 1 All., 403.

64. When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

Consequences
of rescission of
voidable con-
tract.

[This section defines the position of the parties to a contract which has been avoided by one of them under any of the preceding provisions, Section 19, 39, 53 or 54; the party against whom the contract is avoided is thenceforth discharged from all further performance: the party avoiding is bound to restore, "so far as may be," any benefit which he has received under the contract. Thus, where there had been a partial delivery or payment to the party avoiding the contract, he would be bound, on avoidance, to return the goods or money to the opposite party; the words "so far as may be" must, it is presumed, be read as equivalent to the phrase "make compensation for it," in the next succeeding section. Payments of money or deliveries of goods, made to the party against whom the contract is avoided, would, it is presumed, be recoverable from him as damages arising out of the breach. In some cases they would be recoverable under the express provision of Section 72. See note to that section. From the word "benefit" it must be inferred that, if the party avoiding a contract could be shown to have made a profit on it up to the point at which avoidance took place, he would be bound to return this profit to the other party. The rule of English law is, that on avoidance of a contract the parties are to be placed in the same position as if it had never been made, and when this is no longer possible, avoidance cannot take place. The same principle has been affirmed in this country (a). From the language of this section it might be argued that a person

(a) *Muhammad Mohidin v. Ottayil Ummache*, 1 Mad. H. C., 390.

may rescind, although it is too late to effect a complete restitution. See, however, Sections 19 and 108 and notes.

In cases where sales of ancestral property by a Hindu co-parcener are set aside at the suit of another co-parcener, the latter can only be compelled to refund the money if it can be affirmatively shown that it went into the family-fund (a).]

65. When an agreement is discovered to be void,

Obligation of person who has received advantage under void agreement, or contract that becomes void.

or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustrations.

(a.) A pays B 1,000 rupees, in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the 1,000 rupees.

(b.) A contracts with B to deliver to him 250 maunds of rice before the 1st of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first of May. He is bound to pay A for them.

(c.) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.

(d.) A contracts to sing for B at a concert for 1,000 rupees, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the 1,000 rupees paid in advance.

[Illustrations (b) and (c) would with more propriety have been appended to Section 64, as they are cases of contracts becoming voidable, not of contracts discovered to be, or becoming, void.

This section seems applicable to those cases in which one party, having paid money under a contract, is by reason of the

(a) *Nathu Lal Chowdhry v. Ohadi Sahi*, 4 B. L. R., A. C., at p. 18.

other party's default or of some other cause disappointed of his anticipated return. According to English law, a person who has paid money for a consideration which afterwards entirely fails is entitled to recover it in an action for money had and received. Thus, if one pays money for bills and they turn out to be forged, he may recover it (*a*).

In the case of a sale of land, it is implied in the contract that the purchaser is to have a good title, and whilst the matter remains in contract he may, if the title proves defective, withdraw from the bargain and recover any purchase-money which he has paid (*b*). But after the conveyance is executed, there is no retreat for him: if he is evicted by a superior title he cannot recover the purchase-money. The principle of *caveat emptor* is applied. Having had an opportunity of investigating the title and having fallen into an error, he has to bear the consequence himself; provided the error has not been caused by the vendor; for, if the defect in title has been concealed by him, there is fraud, and then the purchaser can recover the purchase-money. If the failure of consideration results from the default of the plaintiff himself, he is not entitled to recover, for there is nothing inequitable in the defendant retaining what has been paid him under the contract. Thus, a purchaser who has paid a sum by way of deposit, and afterwards fails to complete, cannot recover the sum as received to his use by the defendant (*c*).

In the absence of fraud, and in the absence of special covenants for title, which are commonly introduced into English contracts for sale of land, the purchaser evicted by a superior title after execution of the conveyance has no redress against his vendor (*d*). Similarly, with regard to goods: unless there

(*a*) *Jones v. Ryde*, 5 Taunt., 487; *Eichholtz v. Bannister*, 34 L. J., C. P., 105.

(*b*) See Specific Relief Act, sec. 25 (*b*).

(*c*) *Ex parte Barrell*, L. R., 10 Ch., 512; *Thomas v. Brown*, 1 Q. B. D., 714.

(*d*) *Sugden V. and P.*, 549, 552; *Clare v. Lamb*, L. R., 10 C. P., 334; *Dorab Ally Khan v. Khajah Moheesooddeen*, I. L. R., 1 Cal., 55; Specific Relief Act, sec. 18 (*d*); *Taylor v. Bowers*, 1 Q. B. D., 291.

is a warranty of title, express or implied, the dispossessed purchaser cannot recover the purchase-money. See note to Section 109.

If the failure be only partial, or, in other words, if the plaintiff derive some benefit from the defendant's performance, he cannot recover the price paid, unless an apportionment of it be practicable. Thus, if goods are sold with a warranty of quality and they turn out inferior, the purchaser cannot recover the price, though he may sue for the breach of warranty. In *Whincup v. Hughes* (a), the plaintiff's son was apprenticed to a watch-maker for the term of six years with a premium of £25, and after a year the watch-maker died. In an action against his executrix for the recovery of the premium, it was held that nothing was recoverable, because the contract had been partly performed and no apportionment of the sum paid was practicable.

Conversely, where the plaintiff has stipulated for a certain payment on the performance of a certain service, he cannot recover on the strength of a part performance, if the service is treated in the contract as entire and there is no means of apportionment. Thus, in the leading case of *Cutter v. Powell* (b), the defendant promised to pay the deceased Cutter 30 guineas, provided he proceeded, continued, and did his duty as second mate in a certain ship from Jamaica to Liverpool. On the voyage Cutter died, and his administrator sued for work and labor done. It was held that, there being an express contract between the parties, and that contract not having been performed by the deceased, nothing could be recovered in the action. It appeared that the sum stipulated for was larger than the ordinary rate; and taking that fact with the particular contract in question, the Court considered that the deceased intended to take his chance of getting the larger sum if the whole duty were performed, and nothing otherwise.

But where a man, instead of having bargained for a lump sum, is to be paid at a certain rate during the period of his service, his death does not discharge the other party from the obligation to pay the instalments which have already fallen due (c).

(a) L. R., 6 C. P., 78.

(b) 2 Smith's L. C., 1.

(c) *Stubbs v. Hollywell Railway Co.*, L. R., 2 Ex., 311.

Upon the same principle, where a charterer promises to pay freight for goods to be delivered at a certain place, and the ship is wrecked before its arrival, he cannot be charged for so much of the voyage as has been performed. However, if he voluntarily accepts his goods at a port of distress, and dispenses with the further carriage, a contract to pay freight *pro ratâ itineris* is implied (a). See Section 70.

No provision appears to be made for the recovery of money paid under an agreement which is, to the knowledge of the parties, void from its inception. Instances of payments so recoverable have been given in the note to Section 64; and generally the proposition seems to hold good, "that if money is paid on goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out; but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action."]

66. The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

Mode of communicating or revoking rescission of voidable contract.

[See Sections 4, 5, and 6.]

67. If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

Illustration.

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

(a) *Cook v. Jennings*, 7 T. R., 381; *Vlierboom v. Chapman*, 13 M. & W., 230.

A is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

[This section provides for another case in which some default on the one side excuses a non-performance on the other side. Although, as in the cases coming under Sections 53 and 54, the promisee may have given no promise on his part to perform either simultaneously with, or previously to, the performance of the other party, yet his concurrence in the latter's performance is generally requisite (see note to Section 38). Giving some information of a fact on which the performance depends, and which is within the knowledge of the promisee, is shown by the Illustration to be the sort of facility which he may be reasonably expected to afford. In a recent case it was held, that a lessor could not be sued upon his covenant to repair, unless he previously had notice of want of repair (a). The rule which governs the giving of notice is stated in the note to Section 31. Refusal by a purchaser to accept goods excuses the vendor from tendering them (see Section 39 and note). So, also, to an action brought upon an apprenticeship-deed against a master for not teaching his apprentice, it was held to be a good plea that the apprentice refused to be taught (b). See note to Section 39.]

CHAPTER V.

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT.

68. If a person, incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Claim for necessaries supplied to person incapable of contracting, or on his account.

(a) *Makin v. Watkinson*, L. R., 6 Ex., 25.

(b) *Raymond v. Minton*, L. R., 1 Ex., 245.

Illustrations.

(a.) A supplies B, a lunatic, with necessities suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b.) A supplies the wife and children of B, a lunatic, with necessities suitable to their condition in life. A is entitled to be reimbursed from B's property.

[This section deals with two classes of cases:—

1. Where a person who is incompetent to contract is supplied by another with suitable necessities ;

2. Where one whom such incompetent person is bound to support is so supplied.

In both cases it is provided that the supplier of the necessities is to be reimbursed from the property of the incompetent person : but it is to be observed that the section does not purport to make such person liable personally. A similar distinction between personal liability, and liability in respect of property, is made in Section 247 with respect to partners who are minors.

The goods supplied must be necessities suited to the person's condition in life : and so long as this rule is complied with, it is immaterial that he had, at the time of a purchase on credit, ready money sufficient to supply him with necessities. The question what are necessities, is a question of fact, and numerous decisions are to be found upon it in the books ; but the main principle on which the decisions rest is that affirmed in the section. It is well expressed and illustrated in *Chapple v. Cooper* (a) and *Ryder v. Wombwell* (b).

“ Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral, and religious information may be a necessary also. Again, as man lives in society, the assistance and attendance of others may be a necessary to his well-being. Hence, attendance may be the subject of an infant's contract. Then, the classes being established, the subject-matter and extent of the contract may vary according to the state and condition of the infant himself. His clothes may

(a) 13 M. & W., 256.

(b) L. R., 3 Ex., 90.

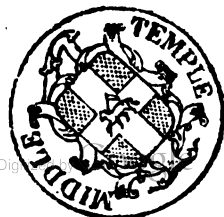
be fine or coarse according to his rank ; his education may vary according to the station he is to fill ; and the medicines will depend on the ills with which he is afflicted, and the extent of his probable means when of age. So, again, the nature and extent of the attendance will depend on his position in society ; and a servant in livery may be allowed to a rich infant, because such attendance is commonly appropriated to persons in his rank of life. But in all these cases, it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, articles of mere luxury are always excluded, though luxurious articles of utility are in some cases allowed. So, contracts for charitable assistance to others, though highly to be praised, cannot be allowed to be binding, because they do not relate to his own personal advantage. In all cases there must be personal advantage from the contract derived to the infant himself " (a).

While the section clearly makes the infant's or lunatic's property liable under certain circumstances, it is silent as to the personal liability of the infant or lunatic himself. That he is so liable in English law is clear, but he would, apparently, not be so under the present Act. See Section 11.

The section with the second illustration assumes that a parent is civilly liable to support his children,—an assumption which at least is not warranted by the English authorities. The obligation of a parent to support his children according to his ability, except so far as it may be enforced by criminal proceedings under Statute, is merely a moral obligation, and therefore he comes under no legal obligation to supply them with necessaries. " A father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son, than a brother or an uncle, or a mere stranger, would be " (b). In the same way, on the ground of agency only is a husband liable for things supplied to his wife. Whilst they are living together, there is a presumption of the husband's assent to contracts made by the wife for necessaries suitable to his degree and estate. Where husband and

(a) *Chapple v. Cooper*, 13 M. & W., 252.

(b) *Mortimore v. Wright*, 6 M. & W., 482, cited in 1 Smith's L. C., 150.



wife live separate, the former's liability depends on the circumstances attending the separation. If these are such that he could be judicially compelled to give her alimony, then he is also liable to those who have supplied her with necessaries; but if the separation is caused by her misconduct, or sufficient allowance has actually been paid to her by the husband, then he is not responsible to those who have given her credit (a). In Madras, a Hindu wife who has left her husband on account of his marriage to a second wife has been held not entitled to maintenance, and to have no implied authority to borrow money for her support (b). She is liable for her own debts, but to the extent of her *stridhan* only (c).]

Reimbursement
of person paying
money due by
another, in pay-
ment of which
he is interested.

69. A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration.

B holds land in Bengal, on a lease granted by A, the zamíndár. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue-law, the consequence of such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

[This section lays down a rule, which, though differing in its terms, seems substantially to correspond to the rule of English law, according to which the action "for money paid to the use" of the defendant lies where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money, which the defendant was ultimately liable to pay. The English cases for the most part fall under this rule. Thus (d), where an

(a) *Manby v. Scott*, 2 Smith's L. C., 429.

(b) *Vírasvámí v. Appasvámí*, 1 Mad. H. C., 375.

(c) *Nathubháí Bháílál v. Javher Ráji*, I. L. R., 1 Bomb., 121.

(d) *Foster v. Ley*, 2 Bing., N. C., 269; *Brittain v. Lloyd*, 14 M. & W., 762.

executor was compelled to pay legacy-duty, or where an auctioneer was compelled to pay auction-duty, they were held to be respectively entitled to recover the amount from the persons upon whose behalf the money was paid. But where plaintiff, acting under a bill of sale, seized the defendant's goods on his premises, and left them there till, to his knowledge, rent became due from the defendant to his landlord, and the latter having distrained them, plaintiff paid the amount, it was held that the payment was not a compulsory payment made for the benefit and at the request of the defendant, and that therefore the money was not recoverable. It was considered that the goods remained on the defendant's premises, not for his benefit, but for the plaintiff's convenience, and that he might have removed them (a). In a more recent case (b), the plaintiffs, being mortgagees of a ship, who had taken possession of her, paid off the wages due to the crew from the defendants, for the purpose of liberating her from the proceedings taken against her in the Court of Admiralty. It was held that this was a case in which a person in possession of property in respect of which there was a claim, which ought to have been discharged by another, being compelled to pay, was entitled to reimbursement. If the compulsion to pay arises from a person's own wrongful act he cannot, according to English authorities, recover it. Thus, where an officer in charge of a prisoner arrested for debt, suffered the prisoner to escape, and was, therefore, obliged to pay the creditor himself, it was held that he could not recover the money from the debtor (c). If, subsequently to the payment, a promise is made by the other party to compensate the payer, the circumstances of the payment will not be material, for the latter can recover under Section 25 (2). For contribution between joint promisors and co-sureties, see Sections 43 and 146.

In order to entitle the person making the payment to be reimbursed under this section, it is necessary that he should be 'interested in the payment:' the Illustration indicates the sort

(a) *England v. Marsden*, L. R., 1 C. P., 529, distinguished from *Exall v. Partridge*, cited in 1 Smith's L. C. 164.

(b) *Johnson v. Royal Mail Co.*, L. R., 3 C. P., 38.

(c) *Pitcher v. Bailey*, 8 East, 171.

of interest to which the section refers: payment by a person having any interest in property with a view to prevent the enforcement of legal process against the property; payment by a tenant in order to prevent the exercise of a mortgagee's right of sale against the landlord; payment of legal dues in order to free property from legal detainer in respect of such dues,—would all be payments within the scope of the section. A case corresponding to the Illustration is shown in Act II of 1864 (M), Section 35.

The existence of an interest in the payment is, however, of less importance, because, even if an interest were not shown to exist, payments on account of another would generally be provided for by Section 70. See also Section 25, note (3).]

70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Illustrations.

(a.) A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay A for them.

(b.) A saves B's property from fire. A is not entitled to compensation from B, if the circumstances show that he intended to act gratuitously.

[The English law on this subject, being based on the fiction of a previous request by the person benefited, requires that there should be a recognition and acceptance of the act by him, and that, accordingly, he should have the option of declining it. In *Boulton v. Jones* (a), this doctrine was carried to a great length. There, the defendant had ordered goods of one tradesman, and the plaintiff, another tradesman, sent the goods, and the defendant consumed them without notice of their being sent by the

(a) 27 L. J., Ex., 117.

plaintiff. It was held that the defendant was not liable for the price, because he had never contracted with the plaintiff, and had had no option of returning the goods upon discovering that the plaintiff had supplied them. So, where the plaintiff contracted to command a ship, but abandoned the command during the voyage, and rendered services in assisting to navigate the ship, it was held that he could not claim compensation in respect of such services, because, as the defendant had known nothing about them till the end of the voyage, and had never had the opportunity of accepting or declining them, a promise to pay for them could not be implied (*a*).

But where a person has free option to accept or refuse the tendered service, a promise to pay for it is implied. Thus, where, cargo having been landed at a port of distress, the owner accepted it there and dispensed with its further carriage to its port of destination, it was held that he was bound to pay a proportionate part of the freight; whereas if no alternative had been given him but to accept the goods, the ship-owner could have recovered nothing against him in respect of freight (*b*).

This section seems to adopt a broader principle and one more in accordance with the doctrine of Roman law. According to that system, the "*negotiorum gestor*" was a person who, without any commission, undertook the business of a stranger with the intention of holding him responsible, and not from motives of mere generosity. Provided the business was such that the stranger, had he known the circumstances, would himself have done it or approved of its being done, the *negotiorum gestor* acquired a right of demand against him for all outlay necessarily incurred, and it mattered not that the undertaking proved in the end unsuccessful. At the same time it was incumbent upon the *negotiorum gestor* to exercise ordinary care in performing his self-imposed task. The English Courts have gone some way towards the adoption of this doctrine in those cases where a bailment of goods has been continued under circumstances different from those which were originally contemplated by the parties. Thus, in a recent case, where the defendant failed

(*a*) *Taylor v. Laird*, 25 L. J., Ex., 329.

(*b*) *Vlierboom v. Chapman*, 13 M. & W., 230.

to take immediately a horse which had arrived by the plaintiffs' railway, and the plaintiffs incurred the expense of keeping the horse at a livery stable, it was held that they were entitled to recover such expense, because they were morally, if not legally, bound to take reasonable care of the horse (a). Under similar circumstances, carriers have been held bound to take reasonable care of goods which have remained in their hands after the original purpose of the bailment has been accomplished (b).

It is to be observed that the section lays down three circumstances as necessary to found the right of demand, *viz.*, that the act should be lawfully done, that it should not be the doer's intention to do it gratuitously, and that the other party should enjoy the benefit of it. There is not, therefore, a strict correspondence between the right conferred in the section and the right of the "*negotiorum gestor*." Under the section, the plaintiff need not show that the act in respect of which he claims is one which the defendant would himself have done, had he been able. On the other hand, he has no right of demand, unless the defendant has derived some benefit from the act; so that a person who doctors another man's sick cattle, or employs coolies to rescue another's property from some imminent destruction, would not be entitled to recover for his trouble or his disbursements, if, notwithstanding his efforts, the cattle or the property perished.

And so, when there has been a special contract for the payment of a given sum on the performance of a certain work and the work is not completed, no right to be remunerated for the work actually done arises in favour of the one party, unless the other party has accepted some benefit from the partial performance, or unless some fresh contract has been made. A person who is employed to sell on the terms of receiving remuneration on the sale is not entitled to be remunerated for work done in the mere attempt to sell. If, however, the authority to sell be wrongfully revoked, he may have an action against his employer (c).

(a) *G. N. Railway Co. v. Swaffield*, L. R., 9 Ex., 132.

(b) *Heugh v. L. & N. W. Railway Co.*, L. R., 5 Ex., 51; *Notara v. Henderson*, L. R., 7 Q. B., 225; *Gaudet v. Brown*, L. R., 5 P. C., 134.

(c) *Cutter v. Powell*, 2 Smith's L. C., 24.

In *Melhado v. Porto Alegre, &c., Railway Company* (a), it was held that the plaintiffs, promoters of a Company, could not recover from a Joint-Stock Company preliminary expenses incurred by the plaintiffs in promoting the Company, on the ground that there was no contract between the plaintiffs and the Company. Such a suit might, it would seem, be maintained under the present section.]

71. A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee.

Responsibility
of finder of
goods.

[As to the general duty of bailees, see *post*, Chapter IX, Sections 151, 152.

As to the rights and duties of the finder of hidden Treasure, see Act VI of 1878.]

72. A person to whom money has been paid, or anything delivered, by mistake (1) or under coercion (2), must repay or return it.

Liability of
person to whom
money is paid, or
thing delivered,
by mistake or
under coercion.

Illustrations.

(a) A and B jointly owe 100 rupees to C. A alone pays the amount to C, and B, not knowing this fact, pays 100 rupees over again to C. C is bound to repay the amount to B.

(b) A Railway Company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

[(1) The rights of demand provided for in this section belong to that class which in English law can be enforced by the action 'for money had and received.' They cannot be said to arise out of contract, for the payment which they pre-suppose is made rather with a view of dissolving than of creating an obligation. The equivalent Roman actions were *condictio indebiti*, and *condictio ob causam*. In order to

(a) L. R., 9 C. P., 305.

found the former action, there must be a payment made in the absence of an obligation and under the mistaken supposition of its existence, so as to make it inequitable and unconscientious of the person who has received the money to retain it. Money, therefore, which is paid in fulfilment of a natural obligation is not recoverable, as, for instance, where a person pays a debt which the creditor would have been barred by the Act of Limitation from recovering, or where one pays a debt to which he could have pleaded infancy; because the payee may retain it with a safe conscience, though he was barred from recovering it by a rule of positive law. The mistake must be as to the existence of the obligation, and not merely in some collateral matter which may form a motive for the payment. Thus, where a banker paid a customer's cheque under the mistaken impression that he had assets of the customer in his hands, he was held not entitled to recover the money so paid (a). In *Balfour v. Sea, Fire, and Life Assurance Company* (b), the defendants, thinking that certain proceedings had been effectual to amalgamate their Company with another Company which was indebted to the plaintiff, gave him a bill of exchange in payment of the debt. It turned out that the proceedings were ineffectual for the intended purpose, but it was held that the mistake of the defendants was no defence to an action on the bill, it being a mistake merely in motive.

There must have been *bonâ fide* ignorance or forgetfulness on the plaintiff's part of facts which disentitled the defendant to receive the money (c), but it seems that money paid under such mistake may be recovered, although the plaintiff "at the time of the payment had means of knowledge of which he neglected to avail himself." Actual knowledge will, however, of course, be readily presumed from the existence of means of knowledge (d). Further, the mistake must, according to English law, be one of fact and not of law, and, therefore, if a person pay money in full knowledge of the facts, but in ignorance of the law applicable

(a) *Chambers v. Miller*, 32 L. J., C. P., 30.

(b) 27 L. J., C. P., 17.

(c) *Kelly v. Solari*, 9 M. & W., 54.

(d) *Townsend v. Crowdy*, 8 C. B., N. S., 493.

to them, the action does not lie. Thus, where an underwriter, having paid a loss, sought to recover back the money on the ground that a material letter had been concealed, as it appeared that he knew of the concealment at the time of the adjustment, he could not recover (a). It will however be observed that the present section is so worded as to include money paid by a mistake of law as well as by mistake of fact.

In *Frecman v. Jeffries* (b), it was held that the action would not lie, unless notice of the mistake were given by the plaintiff to the defendant and a demand made. This was a case in which an incoming tenant had paid to the out-going tenant a sum fixed by valuers, and sought to recover a part of it, which was said to have been paid in excess owing to a mistake of the valuers. The judgment was also put upon the ground that the defendant had by his conduct made it impossible to restore the parties to their original condition. *Jeff.*

The action does not lie where the defendant has received the money as agent and innocently paid it over to his principal. See note to Section 233.

The mistake may or may not be common to both parties; but if the receiver is aware of the real facts, it is still more inequitable that he should retain the money. In *Martin v. Morgan* (c), the plaintiff was held entitled to recover money paid under a mistake as to matters which constituted motive for the payment, the defendant having known and concealed from him the real state of facts. And again, where a party neglecting no reasonable precaution, but under the imposition of gross fraud, paid money to the defendant, who was the innocent agent of the person who contrived the fraud, it was held that the defendant was bound to repay the money received by him, and that he could not defend himself by the plea that he had paid it to his principal (d).

If there are doubtful questions of law or fact, and parties choose to come to a compromise, a contract made upon that footing is valid, and money paid in pursuance of it would not be recoverable

(a) *Bilbie v. Lumley*, 2 East, 469.

(b) L. R., 4 Ex., 189.

(c) 1 Br. & Bing., 289.

(d) *Shugan Chand v. Govt.*, N. W. P., I. L. R., 1 All., 79.

on the ground of mistake (a), for a compromise in its very nature implies that there is some matter open to question (b).

(2) Coercion has been defined in Section 15, and the definition is wide enough to comprehend what is known in English law as duress of goods. The action "for money had and received" lies for the recovery of money paid in order to release goods unlawfully detained (c).

The act charged as coercion must be unlawful, and therefore money obtained by the enforcement of legal process is not recoverable, and the fact that the money was not really owing is immaterial (d); but where the defendant got a decree for enhancement of rent, which was reversed by the Privy Council, but before such reversal he had obtained several other similar decrees, and where the plaintiff, who had paid such enhanced rents, brought a suit to recover the difference between the amount of enhanced rent recovered and the fixed rent he was bound to pay, it was held by the majority of a Full Bench that this principle did not apply, and that the suit would lie (e). There must, however, be a *bonâ fide* claim; for money extorted by abuse of the process of the Court, or by fraud, is recoverable. The question has arisen whether money paid by a judgment-debtor out of Court to his judgment-creditor can be recovered when the creditor has fraudulently levied the sum a second time through the process of the Court, which, by Section 206 of the Civil Procedure Code, is forbidden to recognize payment not made through the Court itself. The question was answered in the negative by a majority of the High Court of Madras (f). But in a later case, the Full Bench of the High Court of Bengal held that the money was recoverable (g). According to the doctrine of the former Court, a debtor who has paid the

(a) *Longridge v. Dorville*, 5 B. & Ald., 117; *Stapilton v. Stapilton*, 2 W. & T. L. C., 836.

(b) *B. Venkatarâmanna v. Chavela Atchiyamma*, 6 Mad. H. C., 127.

(c) *Atlee v. Backhouse*, 3 M. & W., 633; *Duke de Cadaval v. Collins*, 4 A. & E., 858; *Atkinson v. Denby*, 30 L. J., Ex., 361.

(d) *Marriott v. Hampton*, 2 Sm. L. C., 405.

(e) *Jogesh Chunder Dutt v. Kali Churn Dutt*, 1 L. R., 3 Cal., 30; see also *Shama Purshad Roy Chowdery v. Hurro Purshad Roy Chowdery*, 10 M. I. A., 203.

(f) *Arnâchella Pillai v. Appâvu Pillai*, 3 Mad. H. C., 188.

(g) *Gunamani Dasi v. Prankishori Dasi*, 5 B. L. R., 223.

debt out of Court is not without means of protecting himself against subsequent proceedings in execution for the same debt, for it has been held, that where a claim has been validly compromised out of Court, and the plaintiff notwithstanding seeks to enforce the decree for the whole amount, the Court may set aside the process of execution and restore the parties to the condition which had been disturbed by it, or the party might obtain relief by injunction against execution of the decree (a).

No express provision is made in the Act for the cases where mere fraud has induced the payment of money, nor for the cases where money is got "through extortion or oppression or undue advantage taken of the plaintiff's situation," as where a payment is made to a creditor who is in a position to oppress his debtor.]

CHAPTER VI.

OF THE CONSEQUENCES OF BREACH OF CONTRACT.

73. When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach (1).

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same com-

Compensation
for loss or dam-
age caused by
breach of con-
tract.

Compensation
for failure to dis-
charge obliga-
tion resembling
those created by
contract.

(a) *K. Kesava Pundit v. Subbaraya Takker*, 7 Mad. H. C., 387.

pensation from the party in default, as if such person had contracted to discharge it and had broken his contract (2).

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience (3) caused by the non-performance of the contract must be taken into account.

Illustrations.

(a.) A contracts to sell and deliver 50 maunds of saltpetre to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract-price falls short of the price for which B might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(b.) A hires B's ship to go to Bombay, and there take on board, on the first of January, a cargo, which A is to provide, and to bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.

(c.) A contracts to buy of B, at a stated price, 50 maunds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract-price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.

(d.) A contracts to buy B's ship for 60,000 rupees, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract-price over the price which B can obtain for the ship at the time of the breach of promise.

(e.) A, the owner of a boat, contracts with B to take a cargo of jute to Mirzapúr, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapúr is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensa-

tion payable to B by A is the difference between the price which B could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course, and its market-price at the time when it actually arrived.

(f.) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conform to the contract.

(g.) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freight rises, and, on the first of January, the hire obtainable for the ship is higher than the contract-price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract-price and the price for which B could hire a similar ship for a year on and from the first of January.

(h.) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract-price of the iron and the sum for which A could have obtained and delivered it.

(i.) A delivers to B, a common carrier, a machine, to be conveyed, without delay, to A's mill, informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

(j.) A, having contracted with B to supply B with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A 20,000 rupees, being the profit which A would have made by the performance of his contract with B.

(k.) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and, in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a

contract which B had made with a third person at the time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract-price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

(l.) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be re-built by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of re-building the house, for the rent lost, and for the compensation made to C.

(m.) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.

(n.) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

(o.) A contracts to deliver 50 maunds of saltpetre to B on the first of January, at a certain price. B, afterwards, before the first of January, contracts to sell the saltpetre to C at a price higher than the market-price of the first of January. A breaks his promise. In estimating the compensation payable by A to B, the market-price of the 1st of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.

(p.) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.

(q.) A contracts to sell and deliver to B, on the 1st of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be

used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract-price of the cloth and its market-price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

(r.) A, a ship-owner, contracts with B to convey him from Calcutta to Sydney in A's ship, sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage-money. The ship does not sail on the first of January, and B, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage-money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

[(1) The loss or damage for which compensation is recoverable in case of breach must be, either (1) such as arises naturally in the usual course of things from the breach, or (2) such as the parties knew at the time of the contract to be likely to result from the breach: but in neither case must it be remote or indirect; and in both cases the means which existed for remedying the inconvenience occasioned by the breach must be taken into account.

The simplest case is where there is a contract to deliver goods, and a breach: the loss naturally arising from the breach in this case is, obviously, the difference between the contract-price of the goods and their market-price on the day when they ought to have been delivered; or, if the contract be for work and labor, as for the repair of a house in a certain way, the party who has engaged to do the work, but in fact does not perform it so as to correspond with the specification, is liable in damages to such an amount as will make the work correspond with the specification. In Illustration (f), which states this case (a), it is supposed that the builder has received payment in advance. It is conceived that this circumstance is immaterial. If the payment has been made, the only remedy which the other party has

(a) *Cutter v. Powell*, 2 Sm. L. C., 32.

is by action for damages. If the payment has not been made, the other party may either bring this action, or, being sued by the defaulting builder for the contract-price, use the breach in reduction of the claim (a). Illustration (b) shows that, though the price of the goods may be the same, and so no loss on this score be inflicted on the plaintiff, yet he may sue for trouble and expense incidental to replacing the goods which ought to have been delivered. Illustration (c) shows that, where the breach consists in non-delivery of goods, the measure of damages is the difference between the contract-price and the market-price on the day on which delivery should have taken place (b), not the profit which the plaintiff might have earned on a sale of the goods previously to the day on which delivery should have taken place. The market-price on the day on which delivery should be made is not, however, invariably the standard by which damages in such cases are assessed. Where, for instance, it appeared that the plaintiff had, at the defendant's request, forbore from pressing the claim for damages which arose upon the latter's breach of contract to deliver within the specified time, and had acquiesced in the delay, it was held that the plaintiff was, upon bringing his action, entitled to a sum equal to the difference *then* existing between the contract-price and the market-price, which difference was much larger than that which had existed at the time when the breach took place (c).

In a recent case (d), A had contracted to make certain deliveries of iron to B, and had failed to do so. B sued and claimed as damages, not merely the difference between the contract-price and the market-price on the days on which the deliveries became due, but further in respect of a subsequent rise in prices occurring during a period of delay which he alleged to have been "for the convenience and advantage of the defendant." It was held that the delay had not been at the defendant's request so as to bring the case within the principle laid down in *Ogle v. Earl Vane* (e).

(a) *Cutter v. Powell*, 2 Sm. L. C., 32.

(b) *Cohen v. Cassim Nana*, 1 L. R., 1 Cal., 264.

(c) *Ogle v. Vane*, L. R., 3 Q. B., 272.

(d) *Ex parte Llansamlet Tin Plate Co.*, L. R., 16 Eq., 158.

(e) L. R., 2 Q. B., 275.

In that case Baron Martin said :—" When the time comes to complete a contract to supply goods, and the vendor says, ' I cannot deliver,' the damages are the difference between the market-price when the contract is broken and the contract-price. But if the vendor holds out that he will be able to deliver at some future time, and the vendee waits accordingly, there is no fresh contract, but the circumstance may be taken into consideration in ascertaining the damages, when the vendee goes into the market on the vendor turning out unable after all to deliver the goods." " That was left to the jury, and the jury found a verdict for the larger amount, for more than the market-price at the time when the contract was broken " (a).

When the day for performance and the day of breach are not the same by reason of the promisee refusing before-hand to perform a contract, the performance of which is to extend over a period of time, then the rule is, that the difference between the contract-price and the market-price at the respective dates when performance is due should determine the damages. Thus, where defendant, having undertaken to deliver 500 tons of iron in equal portions during the months of September, October and November; gave notice that he did not intend to deliver any at all, the plaintiff was held entitled to damages equal to the aggregate of the differences between the market and contract-price at the end of the three months respectively (b). In another case (c), where the contract was of the same nature, and the defendants refused to perform their part by making delivery, an action was immediately brought by the plaintiff, and the trial took place before the last month fixed for delivery had expired—the Court nevertheless followed the rule laid down in the last-cited case.

Brett, J., also relied on the judgment in *Frost v. Knight*, observing that " it involves the very distinction which I am endeavouring to lay down, viz., that the election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages; and that, when you come to estimate the damages, it must be by the difference

(a) L. R., 16 Eq., 158—9.

(b) *Brown v. Muller*, L. R., 7 Ex., 319.

(c) *Roper v. Johnson*, L. R., 8 C. P., 167, cited in note to Sec. 39.

between the contract-price and the market-price at the day or days appointed for performance, and not at the time of breach."

Illustration (j) shows the full length to which knowledge of the results of a breach will render the party committing it liable for compensation. The converse of this case is shown in Illustration (k). A loss arising out of inability to perform a contract, though the inability be occasioned by another person's breach of his contract, is no ground for compensation against that other person, unless he was aware of the other contract and of the necessary results of a breach of his own contract. Thus, where a manufacturer, in consequence of non-delivery of some article, has to suspend work, unless the defaulting party knew, when he made the contract, that this would be the result of his default, he is not liable for the special loss occasioned by the manufacturer's suspension of work, Illustration (p). It is otherwise, however, if he knows that the suspension of work will result from non-delivery, Illustration (i).

On this point the provisions of the section correspond generally with the English law as laid down in *Hadley v. Baxendale* (a); but it appears to go further than any of the subsequent English decisions in the effect which it gives to mere *knowledge* of the results of a breach, apart from an undertaking to be responsible for those results, as entitling the party injured by the breach to recover exceptional damages. In a recent case, *Horne v. Midland Railway Company* (b), in the Exchequer Chamber, the subject was discussed at great length, and Blackburn, J., advert-
ing to *Hadley v. Baxendale*, observed: "This doctrine has been
"adverted to in several subsequent decisions with more or less as-
"sent; but they appear to have all been cases in which it was held
"that the doctrine did not apply, because there was no special
"notice. It does not appear that there has been any case in
"which it has been affirmatively held that, in consequence of
"such a notice, the plaintiff could recover exceptional damages.
"The counsel for the plaintiffs could not refer to any such case,
"and I know of none. If it were necessary to decide the point,
"I should be much disposed to agree with what my brother

(a) 23 L. J., Ex., 179; see also *Sanders v. Stuart*, 1 C. P. D., 326.

(b) L. R., 8 C. P., 131.

“Martin has suggested, *viz.*, that in order that the notice may “have any effect, it must be given under such circumstances, as “that an actual contract arises on the part of the defendant to “bear the exceptional loss.”

The same view was taken by Lush, J., who said: “I agree with the suggestion that the notice in such cases (*i. e.*, such as *Hadley v. Baxendale*) can have no effect except so far as it leads to the inference that a term has been imported into the contract making the defendant liable for the extraordinary damages;” and he quoted an observation of Willes, J., in *British Columbia Saw Mills Company v. Nettleship* (a), that “the knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it.” See also *Die Elbinger Actien-Gesellschaft v. Armstrong* (b), where the damages arising from a delay in delivery were discussed.

Under the present section, the qualification suggested by Blackburn and Lush, JJ., is not preserved; mere *knowledge*, at the time of making the contract, that a special loss is likely to result from the breach, appears to be sufficient to render the person committing the breach liable, provided the loss be not indirect or remote.

Again, in a recent case, the plaintiff, a manufacturer, who was in the habit of attending at agricultural shows to exhibit samples of his goods, and made a profit by the practise, delivered them upon a show-ground, where he had been exhibiting them, to the receiving agent of the defendants, a railway company, to be carried by a particular day to a show-ground at another place, when and where a similar show, at which he intended to exhibit, was to be held, but nothing was expressly said about this intention of the plaintiff. The samples did not arrive till after the day stipulated and when the show was over. In an action for breach of contract the Court held that the plaintiff was entitled to damages. “The law, as it is to be found in the “reported cases, has fluctuated; but the principle is now settled “that, whenever either the object of the sender is specially

(a) L. R., 3 C. P., 499.

(b) L. R., 9 Q. B., 473.

"brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object" (a).

With regard to the question of remoteness and indirectness, Illustration (n) gives a case of damage so remote and indirect that no compensation in respect of it can be claimed. A contracts to pay a sum of money to B on a certain day; he fails to do so, and, in consequence of this failure, B is unable to pay his debts, and is totally ruined. Here, ordinarily, even if the parties knew at the time of the contract that the consequence of the non-payment by A of the sum on the day agreed would be B's bankruptcy, A is liable only for the money and the interest due upon it, because the bankruptcy, though in one way occasioned by the non-payment, is a remote and indirect result of it: coupled with various special circumstances, the non-payment produced a special result: but the law can look only to the natural and direct consequences of an act.

In *Featherston v. Wilkinson* (b), "the defendants, by charter-party, agreed with the plaintiff that their ship should, at a specified time, load 1,300 tons of coal in the river Tyne, to be carried to Havre for the plaintiff. They broke their contract, and the plaintiff had, in consequence, first to hire other vessels at an advanced freight, and, secondly, to buy 1,300 tons of coal at an enhanced price. He was unable, according to the custom of the colliery-trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. The plaintiff having sued the defendants in respect of both these heads of damage, the defendants admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial the rise in price at the pit's mouth was not disputed; but it was not directly proved that there had been an equivalent rise at Havre." It was held, "that the fact of the plaintiff having paid the additional price was *prima facie* evidence of damage to that extent, and

(a) *Simpson v. L. & N. W. Ry.*, 1 Q. B. D., 274.

(b) *L. R.*, 8 Ex., 122.

entitled him, in the absence of evidence to the contrary, to recover."

Illustration (1) indicates the kind of consequences of a breach for which, when the party committing the breach is aware of the facts of the case, he may be called upon for compensation. The cost of re-building the fallen house is, of course, a loss arising naturally and directly out of the breach, but the loss of C's rent and the compensation to C for not letting him into possession, are grounds of compensation only if the party knew the facts of the case.

In the absence of notice of the consequences which will ensue from a part of the goods shipped being lost, and of any contract, express or implied, to be answerable for such consequences, the shipper of such goods, on a part being lost, is entitled, over and beyond the sum necessary to replace the lost part, only to receive interest on the said sum till payment, even though the rest of the goods have been rendered useless, till the portion lost is replaced (a).

A common carrier, who accepts goods without inquiring as to their nature, is responsible to the full extent of the value in case of loss, and cannot complain that he was not informed of it. But see Act III of 1865, Section 3, as to liability of common carriers for loss in case of certain goods; and Act XVIII of 1854, Section 10, as to the liability of Railway Companies.

In sales of immoveable property the English authorities (b) laid down the rule that contracts for the sale of real property are on condition that the vendor has a good title, and that, if the vendor fails to make out a good title, the purchaser can only get back his deposit and costs, and is not entitled to damages for the loss of his bargain. The soundness of the doctrine affirmed in *Flureau v. Thornhill* was, however, questioned by Lord Tenterden in *Hopkins v. Grazebrook* (c), and by Cockburn, C. J., in *Engell v. Fitch* (d). In *Hopkins v. Grazebrook* it was held that, where the

(a) *British Columbia Saw-Mill Company v. Nettleship*, L. R., 3 C. P. 499.

(b) *Flureau v. Thornhill*, 2 W. BL, 1078.

(c) 6 B. & C., 31.

(d) 37 L. J., Q. B., 145.

vendor sold without any title at all, as *e. g.*, where he had merely contracted for the purchase of the property which he purported to sell, he was liable for damages in respect of the vendee's loss of his bargain (*a*): so also where he had merely an equitable claim on the rents and not the legal estate. On the other hand, a vendor, having a mere equitable title, but believing that he had a good title, has been held to fall within the protection which the doctrine affirmed in *Flureau v. Thornhill* affords (*b*).

The subject has been recently discussed in the House of Lords (*c*), and the following proposition, after taking the opinions of the Judges, was affirmed,—“that, upon a contract for the sale of real estate, where the vendor, without his default, is unable to make a good title, the purchaser is not by law entitled to recover damages for the loss of his bargain,” but merely expenses actually incurred. Anything beyond expenses actually incurred must, said Lord Chelmsford, on the authority of *Flureau v. Thornhill* (*d*), be recovered in an action for deceit. The contrary had been held in *Hopkins v. Grazebrook* (*e*), but this case is now overruled. In *Bain v. Fothergill*, Lord Hatherly drew a distinction between a sale of immoveable property and a sale of a chattel. “In the former, the purchaser knows that there must, with all the complications of our law, be an uncertainty as to making out a good title: in the latter the vendor must know what his right to the chattel is.”

This rule, however, has no application to a case where the failure either to make out a title or to give possession arises, not from the inability of the vendor, but from his unwillingness either to remedy a defect in the title, or to obtain possession on the score of expense. Where, therefore, the vendors, as mortgagees of the property, were fully entitled to convey it, but failed to give possession because of their unwillingness to incur the expenses of an ejectment against the mortgagor, who refused to quit the premises, it was held, that the special rule limiting the damages

(*a*) *Robinson v. Harman*, 18 L. J., Ex., 202.

(*b*) *Pounsett v. Fuller*, 25 L. J., C. P., 145; *Sikes v. Wild*, 32 L. J., Q. B., 375.

(*c*) *Bain v. Fothergill*, L. R., 7 H. L., 158.

(*d*) 2 W. Bl., 1078.

(*e*) 6 B. & C., 31.

did not apply, and that the purchaser could recover, not only the amount of the deposit and the expenses of examining the title, but the profit on a re-sale of the premises, and the cost of the conveyance to the sub-vendee (a).

Where a purchaser is entitled to special damages, the price at which the vendor has re-sold the property has been considered *prima facie* proof of its market-value (b). For a case in which the doctrine laid down in *Flureau v. Thornhill* was held not to apply, see *Wall v. City of London Real Property Company* (c), where, in an action for not granting an entrance which defendant had conveyed to plaintiff, the plaintiff was held entitled to such damages as would amount to the difference between the present state of things and what it would have been if the contract had been performed.

Except in the instance of special damages, the person injured may use his claim as well by way of ground for an action as in reduction of the claim made against him by the other party. When a person engages to do a specified work in a specified manner or on certain terms, but in fact does not do the work so that it corresponds with the specification, he is not entitled to recover the whole price agreed upon. He is only entitled to recover that price subject to a deduction, and the measure of that deduction is the sum it would take to alter his work so as to make it correspond with the specification. See Illustration (b) and note to Section 118. The person, however, who complains of a breach is not bound to use the matter in reduction of the damages claimed against him; his failure to do so does not disentitle him to bring a separate action, by which means alone he can recover special damages (d).

(2) This paragraph refers to cases referred to in Chapter V; its effect is to place the relations there mentioned, so far as a right to damages is concerned, on exactly the same footing as contracts.

(a) *Engell v. Fitch*, L. R., 4 Q. B., 659.

(b) *Godwin v. Francis*, 39 L. J., C. P., 121.

(c) L. R., 9 Q. B., 249.

(d) *Davis v. Hedges*, L. R., 6 Q. B., 687.

(3) "Remedying the inconvenience," *i. e.*, "obviating or lessening the loss or damage;" see Illustration (b), where all the loss occasioned by the breach was obviated except A's trouble and expense in getting another ship. So, also, an agent or servant wrongfully discharged from employment is bound, if possible, to obtain fresh employment, and the wages which have been or might have been gained by such employment are deducted from the sum to which he is entitled in respect of damages (a).

In the cases where one party declares beforehand his intention not to perform the contract and the other elects to treat this repudiation as a breach, the Court will, in estimating the damages, take into account whatever the plaintiff has done or has had the means of doing, and as a prudent man ought in reason to have done, whereby his loss has been, or would have been, diminished (b). But the plaintiff is not bound to go into the market and obtain a forward contract similar to the one which has been broken, which might be either to his advantage or detriment, as the market might fall or rise (c).

The occurrence of abnormal circumstances does not enhance or reduce the amount of damages claimable. So, where some of the plaintiffs, who were shipowners, made extraordinary profits in consequence of the defendant's breach of a contract, it was held that such accidental benefits could not be used to reduce the damages claimed by the plaintiffs (d). Nor are the damages which a person suing a Railway Company for negligence can claim affected by the circumstance of his having received a certain amount on an accident-policy (e).

By Section 192 of Act VIII of 1859, it was provided that, where a suit was for damages for breach of contract, if it appeared that the defendant was able to perform the contract, the Court might, with the consent of the plaintiff, decree specific performance, and in such case should award an amount of damages to be paid as an alternative if the contract is not performed. The ascertainment

(a) *Hochster v. De La Tour*, 22 L. J., Q. B., 458.

(b) *Frost v. Knight*, L. R., 7 Ex., 111.

(c) *Brown v. Muller*, L. R., 7 Ex., at p. 322.

(d) *Jebsen v. East and West India Dock Co.*, L. R., 10 C. P., 300.

(e) *Bradburn v. G. W. Ry. Co.*, L. R., 10 Ex., 1.

of the amount of damages has been held to be a necessary preliminary to a decree for specific performance and alternative damages under this section (a). Act VIII of 1859 has been repealed by the Civil Procedure Code (Act X of 1877), and as to what contracts may be specifically performed, see Section 12 of the Specific Relief Act (I of 1877).

As to facts which are relevant as enabling the Court to calculate the amount of damages, see Evidence Act, 1872, Section 12.]

74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named.

Title to compensation for breach of contract in which a sum is named as payable in case of breach.

EXCEPTION.—When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Government of India or of any Local Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations.

(a.) A contracts with B to pay B Rs. 1,000, if he fails to pay B Rs. 500 on a given day. A fails to pay B Rs. 500 on that day. B is

(a) *Virdáchala Náttán v. Rámasvámi Nayakan*, 1 Mad. H. C., 341.

entitled to recover from A such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b.) A contracts with B that, if A practises as a Surgeon within Calcutta, he will pay B Rs. 5,000. A practises as a Surgeon in Calcutta. B is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c.) A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.

[This section ignores the distinction drawn in English Courts between money recoverable by way of penalty and money recoverable as liquidated damages. In the latter case, according to English law, the whole sum is recoverable; in the former, the penalty is regarded merely as a security for the damages actually sustained. It is often, of course, extremely difficult to say from the language of an instrument to which of the two classes money recoverable under it is to be referred, and much ingenuity has from time to time been expended in the controversies to which this obscure and difficult chapter of law gave rise. The present section, while it places a power somewhat dangerously wide in the hands of the Court, lays down at any rate an intelligible rule as to the principle on which that power is to be exercised. Whenever, in a contract, a sum is named as the amount to be paid in case of breach, the Court is not bound to decide whether the sum so named is a penalty or liquidated damages; but may, whether actual damage is proved or not, award what it considers reasonable compensation up to the amount named in the contract.]

The reasons which necessitate this latitude are obvious. On the one hand, it is impossible to leave parties to exact from each other the full amount of the sums named in their contract, sums generally unadvisedly mentioned, and often totally out of proportion to the amount of real damage inflicted. In a country like India, where millions of contracts are entered into by persons of the most ignorant, improvident, and helpless classes in society, such a state of the law would produce disastrous results. On the other hand, there are cases in which it is expedient to allow one man to recover compensation from another without putting him to the proof of loss, and where it is reasonable that he should have compensation, although no actual loss has been sustained. Under which of these classes a contract ought to be placed is a point

which must be decided with reference to all the facts of each particular case, the relative position of the parties, the nature of the bargain, the circumstances attending execution, and the real intention of the parties. Weighing all these together, the Court is to decide what it is "reasonable" that the promisee should recover in respect of the breach. The Court is not bound, as under the English law, to look solely to the intention of the parties as expressed in the document, though, of course, the intention would be a main consideration. Under the law as it now stands, persons who sign contracts of this description will know the precise amount of risk which they incur in case of breach. They are liable, whether or no any actual loss has been sustained, to pay the entire amount agreed, should the Court consider it "reasonable" for them to do so. On the other hand, it will not be possible to evade the section by using the expression "liquidated damages," or by providing that the sum named to be paid in case of breach shall be regarded, not as a penalty, but as the measure of damage incurred. Notwithstanding such a provision, the Court will be bound to award only that which, under the circumstances, it regards as reasonable.

The Exception is for the purpose of exempting bail-bonds, recognizances, and other instruments of a like nature from the operation of the section, and of making the whole amount mentioned in them in every instance recoverable. Ordinary contracts with Government, however, are governed by the general provisions of the section.

As to the English rule on this subject, see *Dimech v. Corlett* (a) and *Magee v. Lavell* (b) and *Adanky Rámachandra Row v. Indukúri Appalaráju Gáru* (c), where Holloway, J., contrasts the Roman and English systems in this respect.

In *Bichook Nath Panday v. Ram Lochun Singh* (d), an agreement for interest at eight annas per month, with a provision that in default of payment of principal and interest as specified, the rate of interest should be raised to four per cent. per month, was regarded as a penalty, and the interest was reduced to one per cent.

(a) 12 Moo. P. C. C., 199.

(b) L. R., 9 C. P., 107.

(c) 2 Mad. H. C., 451.

(d) 11 B. L. R., 135.

In *re Dagenham Dock Company* (a), there was an agreement by the Company to purchase land for £4,000, £2,000 to be paid at once, £2,000 on a future day, with a provision that, if the whole of the £2,000 and interest was not so paid, the vendor might re-enter without any obligation to repay the £2,000. This was held to be a penalty, and the purchaser was entitled to relief on payment of the balance of the purchase-money and interest.

The cases in which there is a stipulation that the debtor shall, on default of paying up the principal at a certain time, pay interest at a given rate, have been held not to come within this section. They are not cases in which a sum is agreed to be paid in case of breach of a contract. Such a stipulation, therefore, must be enforced unless there is evidence of fiduciary relation between the parties, of imposition or of misrepresentation practised by the creditor on the debtor. In an action on a note given to the plaintiff for Rs. 400, where it appeared that the real consideration amounted to Rs. 275 only, and that the defaulting rate of interest was ten per cent. per mensem, judgment was entered for plaintiff for the amount of the note with interest at twelve per cent. per annum only, the Court holding that the stipulation for the higher rate of interest ought not to be enforced, because there was nothing to show that the defendant understood the real nature of the transaction; the note did not state truly the transaction between the parties, and the rate of interest was exorbitant (b).

The case of a stipulation to pay a sum named in the event of a breach of a contract must be distinguished from that of an agreement to pay a certain sum as the price of doing or refraining from doing a certain act. In the one case, the stipulation is intended to secure the performance of the contract, and the party is not permitted to resist specific performance of it by electing to pay the money; in the other, the agreement is, that the party may, if he chooses, do certain acts upon payment of a sum which is agreed upon as an equivalent. Thus, "if a man let meadow-land for two guineas an acre, and the contract is, that if the tenant choose

(a) L. R., 8 Ch., 1022.

(b) *Mackintosh v. Hunt*, 1 L. R., 2 Cal., 202. See, also, *Omda Khanum v. Brojendro Coomar Roy Chowdhry*, 12 B. L. R., 451; *Peachy v. Somerset*, 1 White & Tudor's L. C., 114.

to employ it in tillage he may do so paying an additional rent of two guineas an acre, no doubt this is a perfectly good contract." The tenant has an election and cannot be restrained from ploughing up the land, for he does not by so doing break his contract, see Specific Relief Act, Section 20.

The Act has been held not to be retrospective as regards this section (a). The law as it stands independently of this section is stated, and the English cases are collected, in 2 Mad. H. C., 451, *Adanky Rámachandra Row v. Indukiri Appalaráju Gáru.*]

75. A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Party rightfully rescinding contract, entitled to compensation.

Illustration.

(a.) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night, A wilfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

[So far as regards contracts avoided on account of the other party refusing or hindering performance, the right conferred by this section has been already provided for by Sections 53 and 54. See also Sections 19 and 39.]

CHAPTER VII.

SALE OF GOODS.

WHEN PROPERTY IN GOODS SOLD PASSES.

76. In this chapter, the word 'goods' means 'Goods' defined. and includes every kind of moveable property.

(a) *Omda Khanum v. Brojendra Coomar Roy Chowdhry*, 12 B. L. R., at p. 458.

[Moveable property is defined in the 22nd section of the Penal Code as including "corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth;" and in Act I of 1868 a very similar definition is given. But it may be questioned whether the term, as used in this chapter, can have been intended to bear such a wide signification. Various sorts of corporeal property are regulated, as regards the transfer thereof from one party to another, by special provisions. Money and the emblems of money, bank-notes, &c., cannot be regarded as "goods," inasmuch as the definition of sale involves "a price," as opposed to the "goods" for which it is offered and accepted (a). Bills of exchange, promissory notes, delivery-orders, dock-warrants, bills of lading, and other documents of a like nature are governed, as regards their transfer, by the special rules and usages of mercantile law. The transfer of ownership in shares in companies is also governed by special laws, and in the case of companies registered in British India, by the provisions of the Indian Companies' Act, 1866. From the Illustration to Section 88, however, it would appear that, so far as those special provisions do not extend, the present chapter is applicable to shares. The term may, probably, be regarded as equivalent to the expression "goods, wares and merchandize," so frequently discussed in English Courts with reference to the Statute of Frauds.]

The term must not be taken to include every conceivable thing, for some things, such as jewels and other materials used for public worship, are "*res extra commercium*" and, therefore, not objects of sale (b).]

77. Sale is the exchange of property for a price.

'Sale' defined. It involves the transfer of the ownership of the thing sold from the seller to the buyer.

[Sale is to be distinguished from barter and from gift; from barter, by the fact that price is not an element of that contract;

(a) See *In the matter of Michell*, 1 Cal. L. R., 339

(b) *Rājah Rājah Verma Valia v. Kottayath Kiyaki*, 7 Mad. H. C., at 219.

and from a gift, because, in case of a gift, there is no consideration for the transfer of the thing given. All the conditions which are essential to the validity of contracts in general are requisite for that of a contract of sale; but it differs from them in this, that its immediate object is the ownership of a thing, whereas the object of other contracts is generally the act of some person. It may be observed that, throughout the Chapter, the expressions "the transfer of ownership," "the passing of the property," and "the completion of the sale" appear to be employed as identical in meaning, and as denoting a state of things under which the risk of the destruction or injury of the thing sold lies with the purchaser; see Section 86. They must be distinguished from "putting in possession," which is the result, not of "sale," but of "delivery." See Section 90.]

78. Sale is effected by offer and acceptance
Sale how effected. of ascertained goods for a price,
or of a price for ascertained goods,
together with payment of the price or delivery of
the goods; or with tender, part payment, earnest or
part delivery; or with an agreement, express or
implied, that the payment or delivery, or both, shall
be postponed.

Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price, or when the earnest, is paid, or when the whole or part of the goods is delivered.

If the parties agree, expressly or by implication, that the payment or delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted.

Illustrations.

(a.) B offers to buy A's horse for 500 rupees. A accepts B's offer, and delivers the horse to B. The horse becomes B's property on delivery.

(b.) A sends goods to B, with the request that he will buy them at a stated price if he approves of them, or return them if he does not approve of them. B retains the goods, and informs A that he approves of them. The goods become B's when B retains them.

(c.) B offers A, for his horse, 1,000 rupees, the horse to be delivered to B on a stated day, and the price to be paid on another stated day. A accepts the offer. The horse becomes B's as soon as the proposal is accepted.

(d.) B offers A, for his horse, 1,000 rupees, on a month's credit. A accepts the offer. The horse becomes B's as soon as the offer is accepted.

(e.) B, on the 1st January, offers to A, for a quantity of rice, 2,000 rupees, to be paid on the first March following, the rice not to be taken away till paid for. A accepts the offer. The rice becomes B's as soon as the offer is accepted.

[This section lays down the conditions which make the sale of *ascertained goods* complete. Its provisions are almost identical with those found in ancient authorities on the Common Law of England. The rule is given by Noy (a) thus: "In all agreements there must be *quid pro quo* presently, except a day be expressly given for the payment, or else it is nothing but communication. If the bargain be that you shall give me £10 for my horse, and you give me one penny in earnest, which I accept, *this is a perfect bargain*; you shall have the horse by an action on the case, and I shall have the money by an action of debt. If I say the price of a cow is £4, and you say you will give me £4, and do not pay me *presently*, you cannot have her afterwards without I will, for it is no contract." Again, another old writer (b) says, "If one sell me his horse or any other thing for money or other valuable consideration; and, *first*, the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money; or *secondly*, all; or, *thirdly*, part of the money, is paid in hand; or, *fourthly*, I give earnest-money, albeit it be but a penny, to the seller; or, *lastly*, I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, in all these cases there is a *good bargain and sale of the thing, to alter the property thereof*." With two exceptions, the law of England has remained the same up to

(a) Noy's Maxims, 87.

(b) Shep. Touch, 223.

the present day. These exceptions are, firstly, that the established rule of English law now is, that the mere bargain for the purchase of a specific article, though nothing is said about payment or delivery, passes the property immediately (a), and therefore the maxim of Noy, as to the necessity that there should be a *quid pro quo*, or a day fixed for payment, does not hold good. In the next place, the Statute of Frauds, 29 Car. II, Cap. 3, necessitates a writing and signature in the case of various contracts of sale. Inasmuch as that enactment is repealed by the Act, and as the present section necessitates, beyond the mere offer and acceptance of a price, that there should be, in order to effect a sale, either payment or part payment, delivery or part delivery, or earnest, or an agreement to postpone the payment or delivery, or both, the effect of the Act appears to be, so far as concerns the sale of ascertained goods, to restore the old English Common law rules. The sale instanced in Illustration (d) would not be good according to existing English law, because it does not comply with the Statute of Frauds. Independently of that Statute, it would equally pass the ownership of the horse, according to English law, although nothing were said about a month's credit. The Act abolishes the necessity for compliance with the Statute of Frauds, while it revives the necessity for an agreement to postpone payment or delivery in cases where there is neither payment, tender, earnest or delivery.

The delivery must be intentional, not a mere accident, or involuntary. Thus (b), where bills were endorsed to A and posted to him in France, but before despatch the vendor re-called them, as by French law he had a right to do, but by mistake the bills were sent, it was held that the property in the bills did not pass to the endorsee, as the vendor had shown an intention of recalling the letter.

Earnest is anything "given by the buyer to the vendor and accepted by the latter to mark the final conclusive assent of both sides to the bargain" (c). Though mentioned by the Statute of Frauds as a ground of exemption from its operation, the practice

(a) *Simmons v. Swift*, 5 B. & C., at p. 862.

(b) *Ex parte Cote*, L.R., 9 Ch., 27.

(c) *Benj. on Pers. Prop.*, 137.

of giving earnest has become almost obsolete in England; in the case of *Blenkinsop v. Clayton* (a), it was held that, when the buyer drew a shilling across the seller's hand and returned it into his own pocket, no earnest had been given.

Earnest is known in Civil law as "*arrha*," and denotes something given, either as a sign of the bargain being struck, or as an advance of a portion of the purchase-money—in which latter case it might partake of the nature of a penalty, and become forfeited upon a withdrawal from the contract (b).

By a decree of the Emperor Justinian it was enacted that, in every case, whether the contract provided it or not, either party might rescind a sale by forfeiting the earnest-money.

With regard to the effect of partial delivery in transferring ownership in the undelivered part, see Section 92, which contains a highly important qualification of the provisions of this section. The provisions of this section appear to modify those of the Hindu law on this subject, according to which transfer of possession is necessary to the completion of a sale (c).]

79. Where there is a contract for the sale of a thing which has yet to be ascertained, made or finished, the ownership of the thing is not transferred to the buyer until it is ascertained, made or finished.

Transfer of ownership of thing sold, which has yet to be ascertained, made or finished.

Illustration.

B orders A, a barge-builder, to make him a barge. The price is not made payable by instalments. While the barge is building, B pays to A money from time to time on account of the price. The ownership of the barge does not pass to B until it is finished.

[We now come to a series of rules which define the conditions necessary in order to pass the ownership in goods sold, in cases which do not fall completely within the scope of the last preceding section. In the first place, in order to pass the ownership

(a) 7 Taunt., 597.

(b) Just. Inst., iii, tit. xxiii.

(c) *Kachu Bayáji v. Kachobá Vithobá*, 10 Bomb. H. C., 491.

in goods, it is necessary, under that section, that the goods should be "ascertained." But it frequently happens that contracts of sale are made about goods which are not at the time of the contract ascertained, or which are not yet made, or which are not completely finished. As in the Illustration to Section 82, the sale may be of a certain unseparated quantity of goods out of a larger bulk; or it may be of an article to be manufactured; or it may be of an article, ascertained and partially made, but which still requires something to be done to it before it is ready for delivery. In such cases the rule is laid down by the present section, and Sections 80 and 82 which repeat and amplify it. This rule is that the ownership of the goods is not transferred till the goods have been ascertained, made or finished, as the case may be.

It must not be understood that the provisions of these sections are intended to override the special arrangements which contracting parties may choose to make between themselves, as to the moment at which the ownership of goods is to pass; but merely that, where no such special arrangement has been made, and where no different intention can be inferred from the language of the contract, the ownership is to pass at the time indicated by the Act. This may be seen from the Illustration to the present section. If B simply ordered A to make him a barge, the ownership in the barge would not, under the section, pass to B till the barge was made. If the parties, however, agree that payment for it shall be made by instalments during the course of the making, the inference from this will be, that they intended that, on payment of each instalment, the ownership of that part of the barge in respect of which the instalment was paid should pass to the purchaser. The provision for payment regulated by particular stages of the work is said to be made with the view of giving the purchaser the security of certain portions of the work for which he is to pay, and to be equivalent to an express provision that on payment of the first instalment the general property in so much of the vessel as is then constructed shall vest in the purchaser (a). It is a question of construction whether this effect is to be given to payments, or whether they are simply to be taken

(a) *Clarke v. Spence*, 4 A. & E., 448; *Benj. on Sale*, 229.

as payments on account, and the intention of the parties must, in each instance, be gathered from the language employed and the general circumstances of the case (a).]

80. Where, by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done.

Completion of sale of goods which the seller is to put into state in which buyer is to take them.

Illustration.

(a.) A, a ship-builder, contracts to sell to B, for a stated price, a vessel which is lying in A's yard; the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery. Under the contract, the property in the vessel does not pass to B until the vessel has been rigged, fitted up, and delivered.

[This section explains the word "finished" in Section 79. A thing is not "finished" in such a sense as to pass the ownership in it to the purchaser, so long as anything remains to be done in order to put it into the state in which the buyer is to take it.

The rule is thus expressed by Blackburn, J. (b): "Where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property." In *Acraman v. Morrice* (c), it appeared that the course of the trade was that the seller of timber should sever the portions rejected by the buyer at his own expense. Before this was done the seller became bankrupt, and the buyer himself had the rejected portions severed, and carried away the rest. In an action brought against him by the bankrupt's assignees, it was held that the property had not passed to him, because something remained to be done by the seller.

(a) *Anglo-Egyptian, &c., Co. v. Rennie*, L. R., 10 C. P., 271.

(b) *Blackburn on Sales*, 151.

(c) 8 C. B., 449.

The observation made on Section 79 applies equally to the present section, *viz.*, that it is not intended to operate in supersession of the intention, expressed or indicated, of the parties as to the moment at which ownership shall pass, but merely to fix that moment in cases where no such intention has been, expressly or impliedly, indicated.

The performance of an act by the purchaser, as well as of one by the seller, may be made a condition necessary to the passing of the property. Thus, where iron was sold under a contract stipulating that certain bills of the plaintiff, then outstanding, should be taken up; the defendant failed to comply with the condition after some of the iron was delivered, and it was held that the plaintiff was entitled to recover his possession (a).]

Completion of
sale of goods,
when seller has
to do anything
thereto in order
to ascertain price.

81. Where anything remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done.

Illustrations.

(a.) A, the owner of a stack of bark, contracts to sell it to B, weigh and deliver it, at 100 rupees per ton. B agrees to take and pay for it on a certain day. Part is weighed and delivered to B; the ownership of the residue is not transferred to B until it has been weighed pursuant to the contract.

(b.) A contracts to sell a heap of clay to B at a certain price per ton. B is, by the contract, to load the clay in his own carts, and to weigh each load at a certain weighing-machine, which his carts must pass on their way from A's ground to B's place of deposit. Here, nothing more remains to be done by the seller; the sale is complete, and the ownership of the heap of clay is transferred at once.

[The two preceding sections deal with cases in which either the goods are unascertained, or something further has to be done in order to render them fit for delivery. In the present section we have another class of cases, *viz.*, where nothing further remains to be done to the goods in order to render them fit for delivery, but where something has still to be done by the

(a) *Bishop v. Shillito*, 2 B. & Ald., 329.

seller in order to ascertain the price. It may be to weigh or measure, or count, or to test the quality or quantity, in some manner agreed on. The effect in each case is the same. If this has still to be done by the seller, the ownership of the goods is not transferred. If it is still to be done, but by the purchaser or any other person except the seller, the sale may be complete.]

82. Where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained.

Completion of sale, when goods are unascertained at date of contract.

Illustration.

A agrees to sell to B, 20 tons of oil in A's cisterns. A's cisterns contain more than 20 tons of oil. No portion of the oil has become the property of B.

[This proposition is comprehended in Section 79. See note to that section.]

83. Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party, for the purpose of the agreement, and that appropriation is assented to by the other, the goods have been ascertained, and the sale is complete.

Ascertainment of goods by subsequent appropriation.

Illustration.

A, having a quantity of sugar in bulk, more than sufficient to fill 20 hogsheads, contracts to sell B 20 hogsheads of it. After the contract, A fills 20 hogsheads with the sugar, and gives notice to B that the hogsheads are ready, and requires him to take them away. B says he will take them as soon as he can. By this appropriation by A, and assent by B, the sugar becomes the property of B.

[Sections 79 and 82 prescribe, as one of the conditions essential to the passing of ownership in goods, that the goods should be

ascertained. This and the next section point out two modes in which this ascertainment may take place.

Under this section there must be an appropriation of the goods by the seller for the purposes of the contract, and that appropriation must be assented to by the buyer. The rule is thus laid down by Holroyd, J.:—"the selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes" (a).]

84. Where the goods are not ascertained at the time of making the contract of sale, and, by the terms of the contract, the seller is to do an act with reference to the goods which cannot be done until they are appropriated to the buyer, the seller has a right to select any goods answering to the contract, and by his doing so, the goods are ascertained.

Ascertainment
of goods by seller's selection.

Illustration.

B agrees with A to purchase of him, at a stated price, to be paid on a fixed day, 50 maunds of rice out of a larger quantity in A's granary. It is agreed that B shall send sacks for the rice, and that A shall put the rice into them. B does so, and A puts 50 maunds of rice into the sacks. The goods have been ascertained.

[In Section 83 the ascertainment of the goods took place by an appropriation on the part of the seller assented to by the purchaser. Such assent would ordinarily, of course, be subsequent to the appropriation. The present section, however, provides for a case in which the buyer's assent is given antecedently to an appropriation by the seller; for by the terms of the contract the seller is to deal with the goods in a manner which is only possible supposing an appropriation to have been first made, and the buyer in agreeing that the seller shall so deal with the goods, impliedly assents *a priori* to the appropriation.

In *Aldridge v. Johnson* (b), the English case from which the Illustration appears to be taken, Campbell, C. J., observed: As

(a) *Bohde v. Thwaites*, 6 B. & C., 388.

(b) 7 E. & B., 885.

soon as each sack was filled with barley, "*eo instanti* the property in each sackfull vested in plaintiff: I consider that here was *à priori* an assent by the plaintiff:" not only was there a sale of barley, but it was a sale of part of a specific bulk which the plaintiff had seen, and he sends the sacks to be filled out of that bulk; and out of that only could the vendee's sacks be filled. No subsequent assent was necessary if the sacks were properly filled. So, also, putting oil into bottles has, under like circumstances, been regarded as an act of appropriation sufficient to pass the ownership (a). When the act of appropriation consists in the shipment of goods, it is not completed until the bill of lading is given, and if by it the goods are not made deliverable to the buyer, there is no appropriation to him. The defendants bought from one Munoz all the ore of a certain mine, stipulating that it should be shipped by Munoz and become their property on being paid for. Munoz, instead of loading the ship with ore on account of defendants, as he should have done, shipped it and took bills of lading, making the cargo deliverable to the order of one S., who was a mere sham. The question being, whether the plaintiffs, who took as pledgees of the cargo from Munoz, or the defendants, who had made payments exceeding its price, were entitled to the cargo, it was held that, notwithstanding the terms of the contract, some appropriation was necessary to distinguish the one paid for from that not paid for, and to transfer the property in it to the defendants, and that the shipment by Munoz, being such as described, did not constitute a sufficient appropriation (b).]

85. Where an agreement is made for the sale of
Transfer of ownership of moveable property, when sold together with immoveable.
 immoveable and moveable property combined, the ownership of the moveable property does not pass before the transfer of the immoveable property.

(a) *Langton v. Higgins*, 4 H. & N., 402.

(b) *Gabarron v. Kreeft*, L. R., 10 Ex., 274; see *Buchanan v. Avdall*, 15 B. L. R., 276.

Illustration.

A agrees with B for the sale of a house and furniture. The ownership of the furniture does not pass to B until the house is conveyed to B.

[Under the circumstances stated in this section, the contract is an entire one, and until its completion, no property passes (a).]

86. When goods have become the property of the buyer, he must bear any loss arising from their destruction or injury.

Buyer to bear loss after goods have become his property.

Illustrations.

(a.) B offers, and A accepts, 100 rupees for a stack of fire-wood standing on A's premises, the fire-wood to be allowed to remain on A's premises till a certain day, and not to be taken away till paid for. Before payment, and while the fire-wood is on A's premises, it is accidentally destroyed by fire. B must bear the loss.

(b.) A bids 1,000 rupees for a picture at a sale by auction. After the bid, it is injured by an accident. If the accident happens before the hammer falls, the loss falls on the seller; if afterwards, on A.

[The question who is to bear the risk of loss of the thing sold is determined here according to the Common law rule. The party in whom the property is vested at the moment of the loss bears the burden of it, and therefore the question of risk is identical with the question of the transfer of the property. Until the property is transferred, no consideration and no risk has passed to the buyer. If there is a misdescription, he can accordingly retract at any time before the conveyance (b), and if the thing is destroyed before the ownership is vested in him, he is absolved from the obligation to pay the price. In equity, on the other hand, the rule, consequent on the principle that the buyer becomes owner by mere force of the contract, is, that on him, from the time of the making of the contract, falls the risk of destruction (c). This rule has been adopted in the 13th Section of the Specific Relief Act,

(a) *Lanyon v. Toogood*, 13 M. & W., 27.

(b) *Flight v. Booth*, 1 Bing., N. C., 370.

(c) *Paine v. Meller*, 6 Ves., 349; *Sugden's Vendors and Purchasers*, 291.

which section as well as the present have to be read with the 56th Section of this Act ; see note to Section 56.]

87. When there is a contract for the sale of goods not yet in existence, the ownership of the goods may be transferred by acts done after the goods are produced, in pursuance of the contract, by the seller, or by the buyer with the seller's assent.

Transfer of ownership of goods agreed to be sold while non-existent.

Illustrations.

(a.) A contracts to sell to B, for a stated price, all the indigo which shall be produced at A's factory during the ensuing year. A, when the indigo has been manufactured, gives B an acknowledgment that he holds the indigo at his disposal. The ownership of the indigo vests in B from the date of the acknowledgment.

(b.) A, for a stated price, contracts that B may take and sell any crops that shall be grown on A's land in succession to the crops then standing. Under this contract, B, with the assent of A, takes possession of some crops grown in succession to the crops standing at the time of the contract. The ownership of the crops, when taken possession of, vests in B.

(c.) A, for a stated price, contracts that B may take and sell any crops that shall be grown on his land in succession to the crops then standing. Under this contract, B applies to A for possession of some crops grown in succession to the crops which were standing at the time of the contract. A refuses to give possession. The ownership of the crops has not passed to B, though A may commit a breach of contract in refusing to give possession.

[Sections 83 and 84 provide for the case of unascertained goods, and show how the ascertainment necessary in order to effect a transfer of ownership may take place. The present section deals with the case where the goods are *non-existent* at the time of the contract, and shows how an act of the seller, done after the goods are produced, in pursuance of the contract, or an act of the buyer to which the seller consents, will operate to pass the ownership. Thus, in Illustration (a), the seller of the indigo gives the buyer an acknowledgment that he holds it at his disposal, and so transfers the ownership to him. In

Illustration (b), the buyer does something to which the seller consents, and the same result is produced. In Illustration (c), although the thing contracted for has come into existence, the seller neither does anything for the purpose of passing the ownership of it to the buyer, nor will he assent to the buyer doing anything towards vesting the ownership in himself; the ownership, accordingly, is not transferred. This section expresses the result of the Common law cases (a), which are in accordance with Bacon's Maxim—" *Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatum effectum, interveniente novo actu.*" but in equity a different rule prevails, and a contract for the sale of chattels to be hereafter acquired, as, for instance, of machinery to be added or substituted, attaches on the specific property which is agreed to be bound by it, and no fresh act is required on the part of the vendee (b).]

88. A contract for the sale of goods to be delivered at a future day is binding, though the goods are not in the possession of the seller at the time of making the contract, and though, at that time, he has no reasonable expectation of acquiring them otherwise than by purchase.

Contract to sell and deliver, at a future day, goods not in seller's possession at date of contract.

Illustration.

A contracts, on the first January, to sell B 50 shares in the East Indian Railway Company, to be delivered and paid for on the first March of the same year. A, at the time of making the contract, is not in possession of any shares. The contract is valid.

[The circumstances under which ownership is transferred having been discussed in the preceding sections, the present section is intended merely to meet a doubt which might otherwise have been suggested as to contracts for the sale of non-existent or unascertained goods. Such contracts do not, as the preceding

(a) *Lunn v. Thornton*, 1 C. B., 379.

(b) *Holroyd v. Marshall*, 10 H. L. C., 191; *Langton v. Horton*, 1 Hare, 549.

sections explain, operate to pass ownership, but they are none the less valid : nor is the validity of a contract for sale of goods not in the possession of the seller affected by the consideration that it contemplates his purchase of the goods in order to a performance of the contract. It is possible, however, that contracts purporting to be sales of goods not in possession of the seller may be in fact mere wagers in disguise, and in this case they will be invalid under the provisions of Section 30.

A sale of things the acquisition of which by the vendor depended upon fortuitous circumstances was called in the civil law "*venditio spei*," and such a contract was complete independently of the fact of acquisition. On the other hand, a sale of things which would in the ordinary course of events come into existence, as, for instance, the sale of a future crop, was not complete until it was actually grown. Under this Act it seems that ownership can in no case pass until the goods are in existence (Section 87), in the possession of the seller, and appropriated to the contract (Section 88). The purchaser has, however, whether ownership has passed or not, the remedy of an action for the breach of the contract.]

89. Where the price of goods sold is not fixed by the contract of sale, the buyer is bound to pay the seller such a price as the Court considers reasonable.

Determination
of price not fixed
by contract.

Illustration.

B, living at Patna, orders of A, a coach-builder at Calcutta, a carriage of a particular description. Nothing is said by either as to the price. The order having been executed, and the price being in dispute between the buyer and the seller, the Court must decide what price it considers reasonable.

[The effect of this section is to enact as a rule of law that which, under the circumstances of the case, must be presumed to have been the intention of the parties. Where people buy and sell without taking the trouble to ascertain or name a price, the inference is that they are content to abide by ordinary rates, and to submit the adjustment of them to the ordinary tribunals.]

DELIVERY.

90. Delivery of goods sold may be made by doing anything which has the effect of putting them in the possession of the buyer, or of any person authorized to hold them on his behalf.

Delivery how made.

Illustrations.

(a.) A sells to B a horse, and causes or permits it to be removed from A's stables to B's. The removal to B's stable is a delivery.

(b.) B, in England, orders 100 bales of cotton from A, a merchant of Bombay, and sends his own ship to Bombay for the cotton. The putting the cotton on board the ship is a delivery to B.

(c.) A sells to B certain specific goods which are locked up in a godown. A gives B the key of the godown, in order that he may get the goods. This is a delivery.

(d.) A sells to B five specific casks of oil. The oil is in the warehouse of A. B sells the five casks to C. A receives warehouse-rent for them from C. This amounts to a delivery of the oil to C, as it shows an assent on the part of A to hold the goods as warehouseman of C.

(e.) A sells to B 50 maunds of rice in the possession of C, a warehouseman. A gives B an order to C to transfer the rice to B, and C assents to such order, and transfers the rice in his books to B. This is a delivery.

(f.) A agrees to sell B five tons of oil, at 1,000 rupees per ton, to be paid for at the time of delivery. A gives to C, a wharfinger, at whose wharf he had twenty tons of the oil, an order to transfer five of them into the name of B. C makes the transfer in his books, and gives A's clerk a notice of the transfer for B. A's clerk takes the transfer-notice to B, and offers to give it him on payment of the price of the oil. B refuses to pay. There has been no delivery to B, as B never assented to make C his agent to hold for him the five tons selected by A.

[Besides the necessity of the goods being ascertained, Section 78 prescribes, as one of the alternative essentials of a transfer of ownership, that there should be delivery. This and the two following sections describe in what delivery consists. If the thing sold is in the seller's possession, he may either actually put it in the control of the buyer or his agent, as in Illustrations (a), (b) and (c), or he may change the character of his own possession and become a bailee for the buyer, or for the buyer's sub-purchaser, as

in Illustration (d). In the first case no difficulty can arise. Instances of the second occur when a seller, after completion of the bargain, hires or borrows the things sold, or undertakes to keep it for the purchaser. In *Elmore v. Stone* (a) and *Marvin v. Wallace* (b), such facts were proved with regard to a horse, and it was held that there had been an actual receipt by the vendee, the vendor having changed his character from that of owner to that of bailee or agent for the purchaser.

If the thing sold is in the possession of a third person, he may, by means of an agreement between himself and the two parties to the sale, be converted from an agent for the vendor into an agent for the purchaser. This case is illustrated by (e).

The mere giving of a delivery-order to the buyer does not, therefore, of itself, without the assent of the bailee of the goods, constitute delivery (c). In *Godts v. Rose* (d), a warehouseman's certificate was given to the buyer upon the condition of his giving a cheque for the price, and, that condition not having been performed, it was held that there was no complete contract between the three parties, and therefore no receipt.

A distinction is made by the custom of merchants between delivery-orders, wharfingers' warrants and such documents, and bills of lading; and while a delivery of the goods is not effected by the transfer of the former documents, such a result does follow from the transfer of bills of lading. The reason of this distinction is thus stated by Blackburn, J.: "They differ in this respect, that when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery-order or dock-warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer

(a) 1 Taunt., 458.

(b) 25 L. J., Q. B., 369.

(c) Bentall v. Burn, 3 B. & C., 423.

(d) 25 L. J., C. P., 61.

of documents of title to goods on shore. Besides this substantial difference between them, there is the more technical one, that bills of lading are ancient mercantile documents which may be subject to the Law Merchant, whilst the other class of documents are of modern invention, and no custom of merchants relating to them has ever been established" (a). See Section 102 and note, as to effect of assignment of documents of title on right of stoppage, and Section 121 as to a result of delivery.]

91. A delivery to a wharfinger or carrier of the goods sold, has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of goods which do not reach him, unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods.

Illustration.

B, at Agra, orders of A, who lives at Calcutta, three casks of oil to be sent to him by railway. A takes three casks of oil directed to B to the railway-station, and leaves them there without conforming to the rules which must be complied with in order to render the Railway Company responsible for their safety. The goods do not reach B. There has not been a sufficient delivery to charge B in a suit for the price.

[Where, under the contract, the seller is to send the goods to the buyer, a delivery of the goods to a common carrier, *à fortiori* to a carrier expressly designated by the buyer, for the purpose of being conveyed to him or according to his directions, constitutes, under English law, a delivery to the buyer (b). This rule is reproduced in the present section, and applied to the case both of carriers and wharfingers. The delivery must, however, be of so complete a character as to render the carrier or wharfinger responsible for the goods; otherwise, it is obvious, an improper

(a) Blackburn on Sales, 297.

(b) Smith v. Hudson, 34 L. J., Q. B., 145.

risk is thrown upon the buyer. Thus, in *Clarke v. Hutchins* (a), the seller neglected to inform the carriers that the value of the goods exceeded £5, although the carriers had advertised that they would not be responsible for packages above that amount, unless declared and paid for as such. It was held that the seller had made no delivery of the goods, not having "put them into such a course of conveyance, as that, in case of a loss, the defendant might have his indemnity against the carriers." In the same way a delivery to a Railway Company, which failed to comply with the requirements of Section 10 of Act XVIII of 1854, or to a common carrier, in contravention of Act III of 1865, Section 3, would not render the buyer liable for the price. It would seem from the terms of the section, that, in case of a part only of the goods being lost, the purchaser would be bound to accept the remainder, a proportionate reduction of the price being made.]

92. A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Illustrations.

(a.) A ship arrives in a harbour laden with a cargo consigned to A, the buyer of the cargo. The captain begins to discharge it, and delivers over part of the goods to A in progress of the delivery of the whole. This is a delivery of the cargo to A for the purpose of passing the property in the cargo.

(b.) A sells to B a stack of fire-wood, to be paid for by B on delivery. After the sale, B applies for and obtains from A leave to take away some of the fire-wood. This has not the legal effect of delivery of the whole.

(c.) A sells 50 maunds of rice to B. The rice remains in A's warehouse. After the sale, B sells to C 10 maunds of the rice, and A, at

(a) 14 East, 475.

B's desire, sends the 10 maunds to C. This has not the legal effect of a delivery of the whole.

[A part-delivery may, it will have been observed, have the same effect under Section 78 as a complete delivery, in causing a transfer of ownership in the whole of the goods sold. The present section, however, provides a very important modification of this rule: it is not *every* partial delivery which has this effect, but only a partial delivery "in progress of delivery of the whole." It is a question of fact, to be determined by the circumstances of each case, whether the delivery of part is to be taken as an inchoate delivery of the whole, or whether there is an intention to sever the part delivered from the rest. Thus, in a case on which Illustration (b) is founded, the circumstance of leave being asked and obtained from the vendor to take away a part of a parcel of hay was taken to indicate an intention to sever that part (a). So a delivery of two puncheons of rum out of a larger quantity was held not to be a delivery of the whole, the vendor having refused a delivery-order for the whole (b). In the same case it was held that the taking of samples, which were not taken as part of the bulk, did not divest the vendor's possession of the remainder. On the other hand, where an order was given for several classes of goods under one contract, the delivery and acceptance of one class was held to be part acceptance of the whole (c), and generally, where delivery is made in the ordinary course of business, as in Illustration (a), with no special circumstance attending it, the inference seems to be that there is no intention to sever a part from the whole, and such a partial delivery will have the same effect in transferring the ownership of the whole of the goods sold as a complete delivery.]

Seller not bound to deliver until buyer applies for delivery.

93. In the absence of any special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery.

(a) *Bunney v. Poyntz*, 4 B. & Ad., 568.

(b) *Dixon v. Yates*, 5 B. & Ad., 313.

(c) *Ellkott v. Thomas*, 8 M. & W., 170.

[This and the following section define the position of buyers and sellers in cases in which there is no special promise as to delivery or as to the place at which it is to take place.

All that the vendor is ordinarily bound to do is so to hold the goods at the buyer's disposal that he may remove them without lawful obstruction. There is no breach of contract on the seller's part in failing to deliver, unless a demand has first been made by the purchaser. If, however, the contract expressly or impliedly impose upon the seller the duty of sending the goods, he must, of course, do so, and, if nothing is said as to time, his promise must be performed within a reasonable time. See Section 46.]

94. In the absence of any special promise as to delivery, goods sold are to be delivered at the place at which they are at the time of the sale ; and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract for sale, or, if not then in existence, at the place at which they are produced.

Place of deli-
very. [“If no place be designated by the contract,” says Kent (a), “the general rule is, that the articles sold are to be delivered at the place where they are at the time of the sale. The store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made, when the contract is to pay upon demand, and is silent as to the place.”

The delivery need only be such as the nature of the case admits. Thus, in *Salter v. Woollams* (b), the defendant, an auctioneer, sold a rick of hay, then on the premises of one J., who had given a license to remove it. The license was communicated to the buyer, and there was also delivered to him a letter to J., requesting him to permit the buyer to remove the hay. J., notwithstanding, refused to allow the hay to be removed, and the buyer sued the auctioneer for non-delivery : it was held, however, that there had

(a) Vol. 2, 677.

(b) 2 M. & G., 650.

been delivery, the auctioneer having made the only delivery which the nature of the case permitted. Upon this case it must be observed that J. had, by granting his license to remove, consented in advance to become bailee for the purchaser, and, therefore, his refusal was not to become bailee, but to perform his duty as bailee.]

SELLER'S LIEN.

95. Unless a contrary intention appears by the contract, a seller has a lien on sold goods as long as they remain in his possession and the price or any part of it remains unpaid.

Seller's lien.

[The circumstances under which transfer of ownership takes place having been reviewed under Sections 78—92, the present section introduces the consideration of certain rights which an unpaid seller of goods enjoys, notwithstanding that the ownership of the goods may have passed to the buyer. These rights are lien, stoppage in transit, and re-sale. This and the three following sections define the right of lien.

It is the right of the seller to retain goods sold: in order that it may exist, it is necessary (1) that a contrary intention should not appear; (2) that the goods should remain in the seller's possession; (3) that the price should be wholly or partially unpaid. As to the first point, Section 96 deals with the ordinary case in which the intention appears to be that there shall be no lien. It is, of course, open to the parties to make what express bargain as to delivery they please, and, in the absence of express agreement, an intention to exclude lien might be inferred from the character of the transaction. Where, for instance, the seller takes a bill of exchange or other security payable at a distant day, the contract is, on the face of it, inconsistent with a right of lien. Thus, in *Chambers v. Davidson* (a), Lord Westbury said: "If a mercantile relation, which might involve a lien, is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and

(a) L. R., 1 P. C., 296.

agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum.*"

As to the second point, anything which constituted a delivery under Section 90, and so put the goods in the possession of the buyer, would have the effect of divesting the seller's possession, and so destroying his lien. Thus, delivery to a common carrier for conveyance to the buyer puts an end to the lien (a). So, no doubt, would any of the events described in Illustration (a), (b), (c) or (e) to Section 90.

In Illustration (d) it will be observed that, though the seller remains in possession of the goods, it is in a completely new capacity, not as owner or vendor of the goods, but as warehouseman for a third party, whose title, as second purchaser, he has recognized. This case is expressly provided for in Section 98. Where no third party is in question, it appears that, where a vendor remains in possession of goods sold, as bailee of the purchaser, the mere receipt by him of warehouse-rent for them from the purchaser would not, under the present section, defeat his right of lien. This is the rule of English law (b), and was, no doubt, intended to be reproduced in the present Act.

In the English Courts the question has been raised, whether a vendor may not, by a part-delivery made without any intention of separating the part delivered from the rest of the goods, lose his right of lien as regards the undelivered part: and the result of the cases is that he may so lose his right of lien where the goods are in the custody of third persons, but not when they remain in his own custody (c). This Act seems to be so framed that the question cannot arise here, inasmuch as, though partial delivery may affect the passing of *ownership*, as provided by Section 92, it does not in any way affect *possession*, except as to the part delivered.

It has been held in England that, where goods are lying at a public wharf, and the seller allows the buyer to mark them, or

(a) *Dawes v. Peck*, 8 T. R., 330.

(b) *Bloxam v. Sanders*, 4 B. & C., 941; *Bloxam v. Morley*, 4 B. & C., 951.

(c) *Payne v. Shadbolt*, 1 Camp., 426.

spend money upon them, or take part of them, this is evidence of a delivery of possession sufficient to destroy the seller's lien, although, had the goods been on the seller's own premises, the lien might not have been destroyed (a).

As to the third point it is to be observed that lien exists only for the price or part of the price. There is not, therefore, any lien in respect of charges for warehousing goods, although such charges or other expenses of a like nature be incurred through the buyer's default. And where the right of lien is exercised and charges are incurred in so doing, it appears that the person exercising the right has no claim at all against the buyer in respect of such charges: they were incurred for his benefit, not the buyer's (b).

The seller has a lien on the whole of the goods sold for the whole price, and, therefore, the buyer is not entitled to have a part of the goods given up to him because he has paid part of the price. But although goods are sold, as the remedy exists only so long as the price is unpaid, and as tender of the price is equivalent to payment (Section 38), it would follow that tender of the price destroys the seller's right of lien: this is the English law (c).

Lien is not affected by the law of limitation, and exists notwithstanding that the debt is barred (d).

As to the special lien of bankers, factors, wharfingers, attorneys of a High Court, and policy-brokers, see *post*, Section 171.]

96. Where, by the contract, the payment is to be made at a future day, but no time is fixed for the delivery of the goods, the seller has no lien, and the buyer is entitled to a present delivery of the goods without payment. But if the buyer becomes insolvent before delivery of the goods, or if the

Lien where payment to be made at a future day, but no time fixed for delivery.

(a) *Cooper v. Bill*, 34 L. J., Ex., 161.

(b) *British Empire Shipping Company v. Somerset*, 27 L. J., Q. B., 397, and 28 L. J., Q. B., 220.

(c) *Martindale v. Smith*, 1 Q. B., 389.

(d) *Seager v. Aston*, 26 L. J., Chan., 809.

time appointed for payment arrives before the delivery of the goods, the seller may retain the goods for the price (1).

Explanation.—A person is insolvent who has ^{‘Insolvency’} ceased to pay his debts in the usual _{defined.} course of business, or who is incapable of paying them (2).

Illustration.

A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's warehouse. Before the expiry of the three months, B becomes insolvent. A may retain the goods for the price.

[(1) The first paragraph of this section describes a case where the seller's lien does not exist, "because a contrary intention appears by the contract." By consenting to give credit, the creditor has, in fact, waived his lien. This was decided in *Spartali v. Benecke* (a), where the sale was of thirty bales of wool "to be paid for by cash in one month, less five per cent. discount;" it was held that the purchaser was entitled to a present delivery of the goods without payment, upon the ground that the lien would be inconsistent with the stipulation in the contract for a future day of payment.

The right of lien is, however, only suspended, not destroyed, by an agreement to give credit: and the second paragraph of the section indicates two cases in which it will come into force, notwithstanding that credit has been given,—viz., where before delivery the buyer becomes insolvent; or when the day fixed for payment arrives before delivery has taken place. This rule, as to the effect of insolvency, is a reproduction of the English law. "If goods are sold upon credit," said Bayley, J., in *Bloxam v. Sanders* (b), "and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains

(a) 19 L. J., C. P., 293.

(b) 4 B. & C., 941.

possession." This right is analogous to that of stoppage in transit. (See Section 94, *ante*.)

So also a seller's lien, which ceases when a bill is given for the price, revives in case the bill is dishonoured before the seller parts with possession of the goods (a).

In a recent case (b), the contract was to deliver 330 tons of bleaching powder, "30 tons per month, payment to be made in cash fourteen days after each delivery." The whole amount was delivered except one instalment, and payment was still due for the instalment last delivered, when the purchaser became insolvent. It was held that the vendor had the right to refuse delivery of the last instalment, until the price of it, as well as of the preceding instalment, had been tendered to him.

The fact of the buyer becoming insolvent does not in itself, any more than does the exercise of the right of stoppage in transit, put an end to the contract of sale (Section 106). But a declaration of insolvency, unaccompanied by any subsequent intimation of intention to enforce the contract, gives the vendor reasonable ground for the conclusion that the buyer has abandoned the contract, and, therefore, gives him the right to rescind (c).

(2) Failure to pay one just and admitted debt is, under English law, sufficient evidence of insolvency to justify stoppage in transit, and, therefore, to justify an exercise of the right of lien under this section (d).]

97. Where, by the contract, the payment is to

Seller's lien
where payment
to be made at fu-
ture day, and
buyer allows
goods to remain
in seller's posses-
sion.

be made at a future day, and the buyer allows the goods to remain in the possession of the seller until that day, and does not then pay for them, the seller may retain the goods for the price.

(a) *Griffiths v. Perry*, 28 L. J., Q. B., 204.

(b) *Ex parte Chalmers*, L. R., 8 Ch., 289.

(c) *Morgan v. Bain*, L. R., 10 C. P., 15.

(d) *Benj. on Pers. Prop.*, 633.

Illustration.

A sells to B a quantity of sugar in A's warehouse. It is agreed that three months' credit shall be given. B allows the sugar to remain in A's warehouse till the expiry of the three months, and then does not pay for them. A may retain the goods for the price.

[This section states in a more general form the proposition contained in the last part of the preceding section. The buyer having allowed the goods to remain in the seller's hands after the expiration of the credit, the parties revert to the position which they would have held if no credit had been given, and, therefore, the seller's lien is revived.]

98. A seller, in possession of goods sold, may retain them for the price against any subsequent buyer, unless the seller has recognized the title of the subsequent buyer.

*Seller's lien
against subse-
quent buyer.*

[The subsequent buyer has no better right to possession of the goods sold than the original buyer, unless the seller has by his conduct led the subsequent buyer to suppose that he assents to the sub-sale. If, either expressly or impliedly, as by receiving warehouse-rent from the subsequent buyer, he recognizes the subsequent buyer's title, the seller cannot afterwards enforce his right of lien against the subsequent purchaser. He has in fact waived his lien. The reason is that, if the sub-purchaser knew that the original purchase-money was unpaid, he would either himself not pay his purchase-money, or would demand it back if it were paid. The acceptance of warehouse-rent from a sub-vendee, as shown in Section 90, Illustration (d), operates as a delivery of the goods, and would similarly be held to be a recognition of the subsequent buyer's title under this section. The recent case of *Knights v. Wiffen* (a) affords a good illustration of the operation of this rule. There, the defendant had sold a portion out of a quantity of barley lying in his granary to M. Before the portion so sold had been ascertained and specifically

(a) L. R., 5 Q. B., 660.

appropriated to him, M sold a part of it to the plaintiff, who paid for it and received from M a delivery-order, addressed to the person in charge of the barley. The plaintiff sent this order to the person in charge, with a letter requesting him to confirm the transfer. The person in charge showed the order and the letter to the defendant, who expressed his assent and his willingness to forward the barley upon being requested so to do. M became bankrupt, and the defendant refused to deliver the barley to the plaintiff upon request being made. It was held that the defendant was estopped by his expression of assent from denying that the property had passed to the plaintiff, inasmuch as his statement had induced the plaintiff to alter his position by refraining from demanding back his money from M.

As to the general rights of subsequent purchasers, see *post*, Section 108.]

STOPPAGE IN TRANSIT.

99. A seller who has parted with the possession of the goods, and has not received the whole price, may, if the buyer becomes insolvent, stop the goods while they are in transit to the buyer.

Power of seller
to stop in transit.

[This right of resuming possession arises only in the case of a buyer becoming insolvent while the whole or any part of the purchase-money remains unpaid, and before the goods reach him. It is not affected by the circumstance of the goods having been sold on credit, as is the case with lien: nor, according to the English authorities, is a seller who has received conditional payment by bill of exchange or other like security precluded from exercising it, even though the bills have been negotiated and are in the hands of third parties (*a*). But where the intention of the parties has been that such an instrument should be taken, not as a conditional, but as an *absolute*, payment, the right of stoppage is gone. Thus, in *Cowasjee v. Thompson* (*b*), a negotiable security was taken in preference to cash, and the Privy Council

(*a*) *Feise v. Wray*, 3 East., 93.

(*b*) 3 M. I. A., 422.

held that this was a "payment in substance," and that the seller had no longer a right of stoppage. A seller, whose bill, drawn against a consignment of goods, has been dishonoured, may exercise the right, notwithstanding that he holds other goods of the buyer's unaccounted for, and that the balance between the two is unadjusted and uncertain (a). But it is possible that such a state of things may exist between a consignor and consignee, that the consignor is not a "seller," and that the price cannot be considered to be unpaid; and in such cases there would be no right of stoppage. Supposing, for instance, that the consignor is indebted to the consignee on a balance of accounts, and the consignment is made specifically to cover that balance, it would seem that the seller has received the price before making the consignment. Lord Ellenborough held, in *Vertue v. Jewell* (b), that in such a case the right of stoppage did not exist; and the effect of the present section would, it is submitted, be the same. Doubt has been cast on this doctrine (c) from its inconsistency with another acknowledged rule of English law, viz., that where a consignee has made advances in respect of a specific consignment, the consignor may, nevertheless, stop the consignment on the consignee's insolvency (d). Under the present section the question would appear to be whether the advance covered the *whole* of the consignment, so that no part of the price remained unpaid; if it did, there would be no right of stoppage.

According to English law, a seller who has never reduced the goods into possession may yet exercise a right of stoppage (e); as where A, having purchased 1,442 sacks out of an entire cargo, sold them, before they were separated from the rest of the cargo, to B, and B became insolvent, it was held that, although the property in the 1,442 sacks had not vested in A, but only a right to take them when separated, yet his interest in them was such as justified him in the exercise of the right of stoppage. From the expression "who has parted with possession" in the present section, it might be inferred that, in order to justify an exercise

(a) *Wood v. Jones*, 7 D. & R., 126.

(b) 4 Camp., 31.

(c) *Benj. on Pers. Prop.*, 633.

(d) *Patten v. Thompson*, 5 M. & S., 350.

(e) *Jenkyns v. Osborne*, 7 M. & G., 678.

of a right of stoppage, the goods must have come into the seller's possession.

A surety who has paid the creditor on behalf of an insolvent creditor is, under English law, entitled to exercise any right of stoppage in transit which the creditor might have exercised; and he would, apparently, be entitled to do so in this country. The right is conferred in England by 19 & 20 Vict., c. 97 (*Mercantile Law Amendment Act*), Section 5, by which a surety who has paid the vendor for his principal is entitled "to stand in the place of the creditor" and "to use all his remedies." A similar right is conferred by Sections 140 and 141 of the present Act.

As, under Section 200, an act done by one person unauthorizedly on behalf of another, which would have the effect of terminating any right or interest of a third person, cannot be ratified, it would seem that an agent acting without authority cannot make a valid stoppage in transit, even though the act be subsequently confirmed. According to the rule recognized in English law, an unauthorized stoppage may be ratified, provided that the ratification takes place before the transit is at a close, a ratification subsequent to the close of the transit being inoperative. The principle upon which this rule is founded is the same as that which appears in Section 200. It is thus stated in *Bird v. Brown* (a):—"The doctrine of ratification must be taken with the qualification, that the act of ratification must take place at a time, and under circumstances, when the ratifying party might himself have lawfully done the act which he ratifies." In that case the defendants had, without any authority from the consignor, stopped goods which were consigned to one whose assignees in bankruptcy the plaintiffs were. The stoppage was ratified by the consignor after the transit was finished; and it was held that it would not operate to divest the right of possession which had vested in the bankrupt or his assignees. Compare Section 200.

If the purchaser turns out not to be insolvent, and the vendor has exercised his privilege prematurely, he will be bound to make delivery and to indemnify the purchaser for expenses incurred by the stoppage (b). Insolvency is defined in Section 96.]

(a) 4 Ex., 786.

(b) *The Constantia*, 6 Rob. Ad., 321.

100. Goods are to be deemed in transit while they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged.

When goods
are to be deemed
in transit.

Illustrations.

(a.) B, living at Madras, orders goods of A, at Patna, and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there delivered to C, a wharfinger, to be forwarded to Madras. The goods, while they are in the possession of C, are in transit.

(b.) B, at Delhi, orders goods of A, at Calcutta. A consigns and forwards the goods to B at Delhi. On arrival there, they are taken to the warehouse of B, and left there. B refuses to receive them, and immediately afterwards stops payment. The goods are in transit.

(c.) B, who lives at Púna, orders goods of A at Bombay. A sends them to Púna by C, a carrier appointed by B. The goods arrive at Púna, and are placed by C, at B's request, in C's warehouse for B. The goods are no longer in transit.

(d.) B, a merchant of London, orders 100 bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. The transit is at an end when the cotton is delivered on board the ship.

(e.) B, a merchant of London, orders 100 bales of cotton of A, a merchant at Bombay. B sends his own ship to Bombay for the cotton. A delivers the cotton on board the ship, and takes bills of lading from the master, making the cotton deliverable to A's order or assigns. The cotton arrives at London, but, before coming into B's possession, B becomes insolvent. The cotton has not been paid for. A may stop the cotton.

[The right of the vendor who has parted with the property in goods to stop them in transit exists during the time in which they remain in the possession of a party who holds a position intermediate between the vendor and the purchaser. The vendor has, on the one hand, divested himself of property and actual possession; the purchaser has, on the other, acquired the property and the right to possession: neither of them has the actual possession.]

The question in each case is, in what capacity does the actual possessor hold the goods? Does he hold as vendor's agent to forward to the agreed destination, or does he hold as purchaser's agent to keep? In the former case the right subsists; in the latter it is determined.

The right of stoppage is not, therefore, determined by the mere fact of arrival at the intended destination, Illustration (b); for, to quote the statement of the law as laid down by Blackburn, J. (a), "the leading fact, viz., the possession of the goods, "is in itself ambiguous, it is necessary to gather the intention "of the parties from their minor acts. If the possessor of the "goods has the intention to hold them for the buyer, and not as "an agent to forward, and the buyer intends the possessor so to "hold them for him, the transitus is at an end; but I apprehend "that both these intents must concur, and that neither can the "carrier of his own will convert himself into a warehouseman, "so as to terminate the transitus without the agreeing mind of "the buyer (*James v. Griffin*, 2 M. & W., 623), nor can the buyer "change the capacity in which the carrier holds possession without his assent, at least until the carrier has no right whatsoever "to retain possession against the buyer (*Jackson v. Nichol*, 5 Bing., N. C., 508)."

When the transit is once at an end and the delivery is complete, the transit does not commence *de novo* because the goods are again sent upon their travels to a new destination (b).

Again, the fact of the purchaser having appointed the carrier, as in Illustration (c), does not make him his agent to keep; but the right of the stoppage continues until the goods have been delivered at the intended destination. It appears, however, that the purchaser may anticipate the end of the transit and put an end to the vendor's right by taking the goods out of the carrier's possession at some intermediate place (c). This is certainly the case if the consignee and the carrier agree together to such a delivery, and it would seem that the same result could follow even though the carrier were to refuse his assent under circumstances

(a) Blackburn on Sales, p. 248.

(b) *Dixon v. Baldwin*, 5 East., 175.

(c) *Whitehead v. Anderson*, 9 M. & W., 518, at p. 534.

which would give the consignee a right of action (a). It is quite clear that a wrongful refusal on the carrier's part to deliver at the place of destination cannot affect the purchaser's right (b).

The fact of the buyer taking the goods on board his own ship, as in Illustration (d), whether it be a general ship or sent on purpose, is an unequivocal fact of possession, for then "they are at home in his hands" and the delivery is complete; but by taking such bills of lading as are mentioned in Illustration (e), the seller expresses his intention not to abandon his control. On the other hand, where, under the contract, goods were to be delivered "free on board," and the bills of lading were made out in the purchaser's name, it was held that the transit was at an end, although receipts taken from the mate on delivery were handed to the sellers (c).]

101. The seller's right of stoppage does not, except in the cases hereinafter mentioned, cease on the buyer's re-selling the goods while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some person on his behalf.

Continuance of
right of stop-
page.

[This and the two following sections define the circumstances under which a seller's right of stoppage is defeated by the purchaser's dealings with a third party in respect of the goods. A mere re-sale, so the present section provides, does not divest the right; but delivery to the second buyer or his agent has the same effect in divesting the right as delivery to the original buyer.]

102. The right of stoppage ceases if the buyer, having obtained a bill of lading or other document showing title to the goods, assigns it, while the goods are in transit, to a second buyer, who is

Cessation of
right on assign-
ment, by buyer,
of document
showing title.

(a) *Whitehead v. Anderson*, 9 M. & W., 518.

(b) *Bird v. Brown*, 4 Ex., 786.

(c) *Cowasjee v. Thompson*, 3 M. I. A., 422.

acting in good faith, and who gives valuable consideration for them.

Illustrations.

(a.) A sells and consigns certain goods to B, and sends him the bill of lading. A being still unpaid, B becomes insolvent, and while the goods are in transit, assigns the bill of lading for cash to C, who is not aware of his insolvency. A cannot stop the goods in transit.

(b.) A sells and consigns certain goods to B. A being still unpaid, B becomes insolvent, and, while the goods are still in transit, assigns the bill of lading for cash to C, who knows that B is insolvent. The assignment not being in good faith, A may still stop the goods in transit.

[The first of the two Exceptions to the rule that re-sale without delivery to a third party will not defeat the vendor's right of stoppage, is where a document showing title to the goods has been assigned by the buyer to a third party, who gives consideration for it and who is acting *bona fide*. The words "document showing title to the goods" must, it is submitted, be read as including the various documents specified in Exception 1 to Section 108, and as equivalent to the expression in the English Act, "instruments used in the ordinary course of business as proof of the possession or control of goods," and "as authorizing the possessor of such document to transfer goods thereby represented." The effect of the section will, therefore, be to do away with the distinction recognized by the English Courts between bills of lading and other documents showing title to goods, according to which the right of stoppage is defeated by the mere assignment of a bill of lading, while, in order to produce this result in the case of the assignment of other documents, it is necessary that the wharfinger or other bailee of the goods should attorn to the assignee of the document (a), see note to Section 90.

Knowledge that goods have not been paid for is not necessarily inconsistent with good faith in a second buyer; but knowledge of the buyer's insolvency, as shown in Illustration (b), would indicate absence of good faith, and an assignment made

(a) *Tucker v. Humphrey*, 4 Bing., 516.

under such circumstances would not defeat the vendor's rights (a). The same is the rule of English law (b).

As to the negotiability of bills of lading, see Act IX of 1856.]

103. Where a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge, to secure an advance made specifically upon it, in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit.

How seller may stop where instrument of title assigned to secure specific advance.

Illustrations.

(a.) A sells and consigns goods to B of the value of 12,000 rupees. B assigns the bill of lading for these goods to C, to secure a specific advance of 5,000 rupees made to him upon the bill of lading by C. B becomes insolvent, being indebted to C to the amount of 9,000 rupees. A is not entitled to stop the goods except on payment or tender to C of 5,000 rupees.

(b.) A sells and consigns goods to B of the value of 12,000 rupees. B assigns the bill of lading for these goods to C, to secure the sum of 5,000 rupees due from him to C, upon a general balance of account. B becomes insolvent. A is entitled to stop the goods in transit without payment or tender to C of the 5,000 rupees.

[The second Exception to the rule laid down in Section 101 is where a document evidencing title to goods is assigned as security for an advance made specifically upon it. The vendor can, in such case, stop the goods only on paying or tendering the amount of the advance to the person who has made it. The right of stoppage is not, however, defeated by the assignment of documents of this character to secure past debts or a general debit balance. The same rule, subject to the same limitations, obtains in English law. It was held in the matter of *Westzynthius* (c), that a stoppage in transit was defeated by the handing over of the bill of lading as security for an advance, subject to the pledgee of the

(a) *Gurney v. Behrend*, 23 L. J., Q. B., 265.

(b) *Vertue v. Jewell*, 4 Camp., 31.

(c) 5 B. & Ad., 817.

bill of lading being bound to render an account to the unpaid vendor. In that and subsequent cases it has been established that the security is good only for the consideration paid by the pledgee, and cannot be applied to a general balance of accounts (a). "In such a case," it was observed by the Judicial Committee, "if the vendor is unpaid, one of two innocent parties must suffer by the act of a third; and it is reasonable that he who, by misplaced confidence, has enabled such third person to occasion the loss, should sustain it. . . . Doubtless the vendor's claim cannot prevail against the claim of a transferee for value given on the faith of a negotiable security fairly and honestly taken; to the extent to which he has so given value he has a prior claim. But the rule is founded on the reason of it, as already explained; *cessante ratione, cessat ipsa lex*. Where there is no advance made or value given upon the faith of the documents; where the object is simply by a sweeping clause to gather in whatever may be got to recoup the creditor of a debtor who had become insolvent for an improvident advance made upon the faith of a totally different security; . . . it appears to their Lordships that such a transfer so made, and under such circumstances, cannot be held sufficient to defeat the vendor's claim" (b). In that case it was held that the right of stoppage was not defeated, because there had been no *bona fide* advance made.

Questions of great nicety occasionally arise under English mercantile law as to the moment at which the transit of goods ends, and at which the negotiability of the bill of lading ceases. The bill of lading remains the only symbol of property in imported goods, until the wharfinger's certificate or warrant is issued; thereupon its negotiability also ceases. Its vitality is not, however, affected by the goods being landed. "I think," said Willes, J., "the bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it" (c).

In accordance with this opinion it was held that the endorsement of a bill of lading, made when the goods were landed and

(a) *Spalding v. Ruding*, 6 Beav., 376; *Meyerstein v. Barber*, L. R., 2 C. P., 38; L. R., 4 H. L., 317.

(b) *Rodger v. Comtoir d'Escompte de Paris*, L. R., 2 P. C., at p. 406.

(c) *Meyerstein v. Barber*, L. R., 2 C. P., at p. 53.

warehoused at a sufferance-wharf under stop for freight, gave a *bond fide* pledge a good title to them.

Section 178 provides that any person who is in possession of documents showing title to goods may, under certain prescribed conditions, make a valid pledge of them. Such a pledge would not, however, if it is submitted, defeat the right of stoppage reserved by the present section.]

104. The seller may effect stoppage in transit,
 either by taking actual possession of
 the goods, or by giving notice of his
 claim to the carrier or other depository in whose
 possession they are.

Stoppage how
 effected.

* [The mere notice to the carrier or other person in actual possession of the goods is sufficient to re-vest the vendor's lien. If therefore, after such notice has been given, the carrier by mistake or in disobedience delivers the goods, the vendor is entitled to recover them from the insolvent (a).]

105. Such notice may be given, either to the
 person who has the immediate possession
 of the goods, or to the principal
 whose servant has possession. In the latter case, the
 notice must be given at such a time, and under
 such circumstances, that the principal, by the
 exercise of reasonable diligence, may communicate
 it to his servant in time to prevent a delivery to the
 buyer.

Notice of sel-
 ler's claim.

[The rule affirmed by this section is thus stated by Parke, B. (b):—"To make a notice effective as a stoppage *in transitu*, it must be given to the person who has the immediate custody of the goods; or if given to the principal, whose servant has the custody, it must be given, as it was in the case of *Litt v. Cowley*, at such

(a) *Litt v. Cowley*, 7 Taunt., 179.

(b) *Whitehead v. Anderson*, 9 M. & W., 518.

a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent the delivery to the consignee." If the principal receives notice under such circumstances, he becomes liable to the vendor if he disregards it; but if from distance or want of communication the principal is unable to prevent delivery, he is free from responsibility, and the vendor's right of stoppage is lost.]

106. Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid.

Right of seller
on stoppage.

Illustration.

A sells to B 100 bales of cotton; 60 bales having come into B's possession, and 40 being still in transit, B becomes insolvent, and A, being still unpaid, stops the 40 bales in transit. A is entitled to hold the 40 bales until the price of the 100 bales is paid.

[The exercise of the right of stoppage does not rescind the contract (a), for it may still be enforced for the benefit of creditors. The vendor does not, therefore, gain an immediate right of re-sale, see Section 107. The stoppage merely re-vests in the seller the right of lien which he enjoyed before parting with the possession of the goods. The Illustration shows that part of the goods may be retained as security for the whole of the price: conversely, under Section 99, the whole of the goods might be retained if any part of the price remained unpaid.]

RE-SALE.

107. Where the buyer of goods fails to perform his part of the contract, either by not taking the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may, after giving notice to the buyer of his intention to do so, re-sell them, after the lapse of a reasonable time, and the buyer must bear any loss,

Re-sale on buy-
er's failure to
perform,

(a) *Ex parte Chalmers*, L. R., 8 Ch., 289.

but is not entitled to any profit, which may occur on such re-sale.

[This section effects a slight alteration of English law. The common law rule is that, where the contract contains an express reservation of the power of re-sale, the vendor may, upon the proper exercise of this power, rescind the contract, and then, inasmuch as he sells the goods as his own, he is entitled to any profits which may be realized in such re-sale (a). He has, in addition, a right of action against his original vendee for breach of contract, the damages in which are the expenses of re-sale and the loss thereon, if such there be. Where, however, no such power of re-sale is expressly reserved in the contract, the result is different. Upon the purchaser's default it seems that, although the vendor may convey a good title to another purchaser, he is still liable to an action for non-delivery, in which the damages will be either nominal, or, in the case of the market-price having risen, will be equal to the difference between the contract-price and the market-value on re-sale. If the vendor re-sells without any default on the purchaser's part having taken place, he is liable to an action, in which the damages will equal the whole contract-value of the goods, the purchaser being on his part liable to an action for the contract-price. Whether, therefore, there be a default before re-sale or not, the contract is, in the absence of an express agreement for re-sale, regarded as still in existence and unrescinded; in either case the goods are sold as the property of the original purchaser, and he is accordingly entitled to any excess of price which they may fetch over and above the price which he agreed to give.

The effect of this section apparently is to put the parties in every case in the position which they would occupy under English law, supposing their contract to reserve expressly to the vendor the right to re-sell. The proper occasion for exercise of his power having arisen, the vendor rescinds the contract, and, inasmuch as the goods are sold by him as his own, he is entitled to reap the advantage of a rise in the market, or to sue the defaulting original vendee in the event of a fall. The reasonable-

(a) *Maclean v. Dunn*, 4 Bing., 722.

ness of the time elapsed may depend on the nature of the goods. A shorter notice would suffice in the case of perishable goods, or goods the price of which may alter in a few days or hours (a).

In order to a valid exercise of the power of sale conferred by this section it is necessary, 1st, that the buyer should have failed to perform his part of the contract, either by not receiving the goods, or not paying the price; 2nd, that the seller should give notice to the buyer of his intention to sell; 3rd, that the seller, after notice, should allow a reasonable time to elapse before the re-sale takes place. The validity of the title of a purchaser on such re-sale would, it is conceived, depend on these conditions having been complied with (a).]

TITLE.

108. No seller can give to the buyer of goods a better title to those goods than he has himself, except in the following cases (1):—

Title conveyed
by seller of goods
to buyer.

Exception 1.— When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership of the goods of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary: Provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods (2).

(a) See *Buchanan v. Avdall*, 15 B. L. R., 276.

Exception 2.—If one of several joint-owners of goods has the sole possession of them by the permission of the co-owners, the ownership of the goods is transferred to any person who buys them of such joint-owner in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them (3).

Exception 3.—When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person who, before the contract is rescinded, buys them in good faith of the person in possession; unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents (4).

In this case (5) the original seller is entitled to compensation from the original purchaser for any loss which the seller may have sustained by being prevented from rescinding the contract.

Illustrations.

(a.) A buys from B, in good faith, a cow which B had stolen from C. The property in the cow is not transferred to A.

(b.) A, a merchant, entrusts B, his agent, with a bill of lading relating to certain goods, and instructs B not to sell the goods for less than a certain price, and not to give credit to D. B sells the goods to D for less than that price, and gives D three months' credit. The property in the goods passes to D.

(c.) A sells to B goods of which he has the bill of lading, but the bill of lading is made out for delivery of the goods to C, and it has not been endorsed by C. The property is not transferred to B.

(d.) A, B and C are joint Hindu brothers, who own certain cattle in common. A is left by B and C in possession of a cow, which he sells to D. D purchases *bonâ fide*. The property in the cow is transferred to D.

(e.) A, by a misrepresentation not amounting to cheating, induces B to sell and deliver to him a horse. A sells the horse to C before B has rescinded the contract. The property in the horse is transferred to C; and B is entitled to compensation from A for any loss which B has sustained by being prevented from rescinding the contract.

(f.) A compels B by wrongful intimidation, or induces him by cheating or forgery, to sell him a horse, and, before B rescinds the contract, sells the horse to C. The property is not transferred to C.

[(1) The general rule, that no one can transfer to another greater rights than he himself possesses, distinguishes goods which can be the object of sale from coin and negotiable instruments, the title to which passes by mere delivery (a). Both the rule and the Exceptions to it have their counterparts in the English Common law. In England, sales at certain prescribed places and times are said to be made in "market overt," and convey a good title to the purchaser irrespective of the seller's right to the goods. In London, every day, except Sunday, is market-day, and every shop market overt for the sort of goods usually sold there. In order to constitute a sale in market overt, the goods must have been exposed for sale and the whole transaction begun, continued and completed in the open market, so as to give the fullest opportunity to the man whose goods have been taken to make pursuit of them and prevent their sale (b).

No corresponding provision has been made in the present Act. The propriety of some such enactment was much discussed, and numerous opinions were invited. The general testimony, however, of officials acquainted with the country was that any provision of the sort would prove a serious incentive to crimes of theft, especially in those parts of India where cattle-lifting is rife. The Exceptions to the present section, however, afford very considerable protection to innocent purchasers.

(2) This Exception seems to adopt the rule laid down in the English cases before the matter had been dealt with by the Legislature. It was said, for instance, in *Dyer v. Pearson*, that the question was "whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having, not the possession only, but the property; for if the

(a) In the matter of Capt. Michell, 1 Cal. L. R., 339.

(b) *Crane v. London Dock Company*, 33 L. J., Q. B., 224.

real owner of goods suffer another to have possession of his property, and of those documents which are the indicia of property then perhaps a sale by such a person would bind the true owner" (a). In subsequent cases, however, a limitation was put upon this rule, restricting it to cases where the person in possession of the goods was one who, from the nature of his employment, might be taken *prima facie* to have the right to sell (b); and the result of the cases on the Factor's Acts (c), although they are not altogether reconcilable with each other, seems to be to put the law on the same footing. In a recent case (d), it is stated in the following terms:—"The result is, that, to bind his principals by a sale or a pledge, the agent must have been intrusted with the goods for the purpose of sale, or he must be a person who is ordinarily intrusted to sell such goods, and must have made the sale or the pledge in the course of his ordinary business, in pursuance of the authority so conferred upon him."

In another case, Cockburn, C. J., after noticing the cases of *Dyer v. Pearson*, *Boyson v. Coles*, and other authorities, continued:—"Sitting here in a Court of Appeal, I feel myself at liberty to say that these authorities fail to satisfy me that at common law the leaving by a vendee goods bought, or the documents of title, in the hands of the vendor till it suited the convenience of the former to take possession of them, would, on a fraudulent sale or pledge by the party so possessed, divest the owner of his property, or estop him from asserting his right to it. If this had been so, there would have been, as it seems to me, no necessity for giving effect by Statute to the unauthorized sale of goods by a factor."

"The doctrine established in *Pickard v. Sears* (e) and *Freeman v. Cooke* (f), and the subsequent cases which have proceeded on the same principle, carry the case no further. In all the

(a) Per Abbott, C. J., 3 B. & C., at p. 42; *Boyson v. Coles*, 6 M. & S., 14.

(b) *Higsons v. Burton*, 26 L. J., Ex., 342; Chitty, 8th edn., 359.

(c) 6 Geo. IV, c. 94, and 5 & 6 Vict., c. 39.

(d) *Cole v. N. W. Bank*, L. R., 9 C. P., at p. 493; *ib.*, 10 C. P. (in Ex. Ch.), 354; see also *Vickers v. Hertz*, L. R., 2 H. L., Sc. App., 113.

(e) 6 A. and E., 469.

(f) 2 Ex., 654.

"cases decided on this principle, in order that a party shall be estopped from denying his assent to an act prejudicial to his rights, and which he might have resisted, but has suffered to be done, it is essential that knowledge of the thing done shall be brought home to him" (a).

The Factor Acts have now been amended, and the protection given by them to persons acquiring title from agents has been extended to innocent parties buying or making advances on goods, or documents of title to goods, in the usual and ordinary course of mercantile business, see 40 & 41 Vic., cap. 39.

It can hardly be doubted that the extremely general wording of the Exception may lead to very dangerous consequences, for all that it requires is, that the person selling should be in possession with the owner's consent, that the buyer should act in good faith, and that the circumstances should not be such as to raise a reasonable presumption against the right to sell. The High Court of Bengal (b) has indeed restricted the operation of the Exception by ruling that it "does not apply where there is only a qualified possession, such as a hirer of goods has, or where the possession is for a specific purpose;" their argument being, that in such cases the owner has no power to give "instructions to the contrary"—because the powers of the person hiring are determined by the contract of hiring. It is clear, however, that those words were inserted for the purchaser's protection, and that full force can be given to them without employing them to define the character of the possession contemplated by the Exception.

It is not clear whether the Exception will cover the case of a sale made by a person who at the time of sale no longer has the consent of the owner to hold the goods or documents of title. Upon the English Statute (5 & 6 Vict., c. 39, Section 4), it has been held, that a secret revocation of the agent's power will defeat the rights of *bond fide* pledgees, although the goods remained in the agent's hands (c). That decision would apparently hold equally good of purchasers; and from this it would follow, that an agent whose authority to hold has been

(a) *Johnson v. Credit Lyonnais Co.*, 3 C. P. D., p 32, at p. 40.

(b) *Greenwood v. Holquette*, 12 B. L. R., 42.

(c) *Fuentes v. Montis*, L. R., 3 C. P., 268; *ib.*, 4 *ib.*, 93.

revoked cannot be deemed to be "in possession by consent of the owner," so as to confer a good title under this section. It is to be observed that the words "by the consent of the owner" do not appear in the corresponding Section 178, which relates to pledges.

In *Laing v. Zeden* (a), it was alleged that a local custom existed at Bombay, by which mate's receipts for goods shipped are negotiable instruments and pass property: and that a captain was bound to give the bill of lading to the person producing the mate's receipt. It was held that such a custom, even if proved, would be inoperative against the captains and shipowners.

(3) According to English law, a sale by one of several co-owners does not affect the interests of the others, but makes the purchaser a co-owner with them. This Exception appears to be based on the assumption of an authority to sell created by the co-owners in favor of him whom they allow to have sole possession, and it casts upon them the burden of proving that the sale took place under such circumstances as to raise a presumption against the existence of such authority.

(4) The third Exception relates to the case where the original contract of sale, though voidable at the vendor's option, has not been avoided before a sub-sale takes place. Under such circumstances it follows from the general rule regulating the avoidance of such contracts, that the option to avoid is lost, because its exercise would affect the rights of innocent third persons. In order that the rule should operate it is necessary, however, that the circumstances which render the contract voidable should not have amounted to an offence by the person in possession or by those whom he represents. If, therefore, the goods have been obtained by a contract voidable on the ground of cheating or of some form of coercion which falls within the Indian Penal Code, the person in possession can confer no title even on an innocent purchaser, but the original owner can reclaim the goods. Apart from this proviso, the English law seems to stand on the same footing. "It is quite clear, that, when a vendee obtains possession of a chattel, with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false

(a) L. R., 17 Eq., 92.

"and fraudulent misrepresentation in order to effect the contract
 "or obtain the possession, the property vests in the vendee until the
 "vendor has done some act to disaffirm the transaction; and the
 "legal consequence is, that if, before the disaffirmance, the fraudulent vendee has transferred either the whole or a partial interest
 "in the chattel to an innocent transferee, the title of such transferee is good against the vendor" (a). But cases of this sort, where, notwithstanding the fraud or mistake, still there has been a contract, must be distinguished from those where there has been an entire absence of consent, and, therefore, no contract. For instance, where the discharged clerk of a customer of the plaintiff obtained goods from him in the name of the customer, it was held, that there was no contract, and that no property passed: the plaintiff was, therefore, entitled to recover the goods from the defendant, an auctioneer, to whom the clerk had sent them for sale (b). The voidable contracts referred to are those mentioned in section 19.

(5) "In this case" means, of course, in case of the vendor having lost his right of rescinding the contract against the original buyer. In cases in which the contract was voidable, as having been obtained by means of an offence, the second purchaser would have a right of action against the original purchaser.]

WARRANTY.

109. If the buyer, or any person claiming under him, is, by reason of the invalidity of the seller's title, deprived of the thing sold, the seller is responsible to the buyer, or the person claiming under him, for loss caused thereby, unless a contrary intention appears by the contract.

[This is an abrogation of the old Common law rule of "*caveat emptor*," and amounts to an affirmation of the principle, that a man by the mere act of selling warrants his title to the article

(a) *Kingsford v. Merry*, 11 Ex., at p. 579.

(b) *Higgons v. Burton*, 26 L. J., Ex., 312; *Hardman v. Booth*, 1 H. & C., 803.

sold. The old rule is thus broadly laid down in Noy's *Maxims* (*Chattels Personal*, p. 89):—"If I take a horse of another man's and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect by the delivery of the horse; and *caveat emptor*." But recent cases, and especially *Eichholz v. Bannister* (a), have, to use Lord Campbell's expression, made so many exceptions as "well nigh to eat up the rule." This section, therefore, may be said to correspond to the now recognized rule of English law.

To contracts for sale of land the principle of "*caveat emptor*" is applied; so that, after execution of the conveyance, the purchaser who has been evicted by a superior title has no redress against his vendor. See note to Section 65.]

Establishment
of implied war-
ranty of good-
ness or quality.

110. An implied warranty of goodness or quality may be established by the custom of any particular trade.

[Warranty is not defined in the Act. Lord Abinger defines it as "an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it" (b). It is, therefore, distinguished from a representation, because the latter is antecedent to the contract, and also because a warranty is independent of the information of the person making it. Although a man may have every reason to suppose that he is justified in warranting the existence of some fact, there is none the less a breach of warranty if it turns out that it does not exist. Compare Section 18 (1).]

Warranty of
soundness impli-
ed on sale of
provisions.

111. On the sale of provisions, there is an implied warranty that they are sound.

[Blackstone lays this down as the rule of English law, but there seems to be no authority for the proposition, and the

(a) 34 L. J., C. P., 105; but see *Clare v. Lamb*, L. R., 10 C. P., at p. 338, and *Bagueley v. Hawley*, L. R., 2 C. P., 625.

(b) *Chanter v. Hopkins*, 4 M. & W., 399, at p. 404.

cases are, apparently, inconsistent with it (*a*). In a recent case, it was said :—" Although the act of exposing in a market for sale animals destined for human food does not imply a warranty that they are free from disease, so as to make the seller responsible if they should turn out to be infected, whether he knew of their condition or not, it does, we think, amount to a representation that, as far as he knows, they are not so infected." In the judgment whence this passage is taken it was also held that the condition of sale "with all faults" did not negative or qualify the implied representation (*b*). Apparently, under this section, the seller is responsible for the wholesomeness of provisions whether he is or is not aware of their condition. This, as well as other warranties of quality, relates to the condition of the goods at the time of sale, and does not cover subsequent deterioration, *e. g.*, such as might be caused by the transit of goods.]

Warranty of
bulk implied on
sale of goods by
sample.

112. On the sale of goods by sample, there is an implied warranty that the bulk is equal in quality to the sample.

[This and the following Sections (113, 114, 115) apply to the case of sale of unascertained goods by description. They are in effect expressions of the proposition which is implied in Section 83, *viz.*, that when the goods are not ascertained at the time of making the agreement for sale, those subsequently appropriated must be goods answering the description in the agreement. In order to determine which of these sections applies in a particular case, it must be seen what is the real object-matter of the contract; whether it is a sale of things equal to a sample shown, or a sale of an article known to commerce, or a sale of an article to be used for a particular purpose. The fundamental undertaking is that the article offered or delivered shall answer the description of it contained in the contract, and this undertaking is an absolute one. "If the article or commodity offered or delivered does

(*a*) Vol. 3, p. 166; *Burnby v. Bollett*, 16 M. & W., 649; *Emmerton v. Matthews*, 31 L. J., Ex., 139; *Bull v. Robison*, 24 L. J., Ex., 165.

(*b*) *Ward v. Hobbs*, 2 Q. B. D., 331.

not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable" (a). The particular rule stated in the section is clearly recognized in the English cases, the exhibition of the sample being generally considered equivalent to a warranty that the bulk of the goods shall answer the description of the small parcel thus exhibited (b). The buyer is allowed a reasonable time for inspection and examination, and if he finds the goods inferior to sample, he is at liberty to return them (c). He is not, however, bound to return them, or even to offer to return them. He may, for instance, keep them declaring that he keeps them at vendor's risk. But if he does keep them in his custody, he must unequivocally express his determination not to accept them in performance of the contract (d).

The consequences of a breach of this warranty will be regulated by Section 118, and the buyer will, therefore, have an opportunity of rejecting the goods after comparing sample with bulk. It does not follow from the exhibition of a sample that the seller intends to sell by sample, for he may by express warranty exclude its operation, or he may exhibit the sample merely for the purpose of enabling the purchaser to form a reasonable judgment of the commodity (e). The provision contained in this section is really included in the more general provision of the next section, and the cases there cited illustrate its effect.]

113. Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk.

Warranty implied where goods are sold as being of a certain denomination.

(a) *Randall v. Newson*, 2 Q. B. D., at p. 109.

(b) *Parker v. Palmer*, 4 B. & Ald., 387.

(c) *Heilbutt v. Hickson*, L. R., 7 C. P., 456.

(d) *Grimoldby v. Wells*, L. R., 10 C. P., 391.

(e) *Gardiner v. Gray*, 4 Camp., 143.

Explanation.—But if the contract specifically states that the goods, though sold as of a certain denomination, are not warranted to be of that denomination, there is no implied warranty.

Illustrations.

(a.) A, at Calcutta, sells to B twelve bags of “waste silk,” then on its way from Moorshedabad to Calcutta. There is an implied warranty by A that the silk shall be such as is known in the market under the denomination of “waste silk.”

(b.) A buys, by sample and after having inspected the bulk, 100 bales of “Fair Bengal” cotton. The cotton proves not to be such as is known in the market as “Fair Bengal:” there is a breach of warranty.

[This section is another application of the general principle stated at the beginning of the last note. If, having regard to the real description of the thing which is the object of the contract, that object appears to be “merely the commercial article or commodity, then the undertaking is, that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, saleable or merchantable” (a).

When a man contracts to sell goods which answer a certain known description, he must deliver goods which are merchantable under that description, and if he fail to do so, the buyer may exercise the option given him by Section 118, and rescind the contract altogether.

Illustration (b) appears to be founded on *Josling v. Kingsford* (b). There, the buyer not only inspected the sample but the bulk, and the vendor said he would warrant the strength of the “oxalic acid;” yet the buyer was held not bound to accept the article tendered, because, by its adulteration, it had lost the distinctive character required by the contract. So, in *Nichol v. Godts* (c), where the contract was for the sale of “foreign refined rape-oil warranted only equal to sample,” it was held, in an action for not accepting the article tendered, that it

(a) *Randall v. Newson*, 2 Q. B. D., at p. 109.

(b) 32 L. J., C. P., 94.

(c) 23 L. J., Ex., 514.

was necessary for the vendor to establish that it was not only equal to the sample as to quality, but that it was in fact such an article as answered the description of foreign refined rape-oil. In *Azemar v. Casella* (a), the contract was for cotton guaranteed equal to sample, to arrive by the *Cheviot* from Madras: "should the quality prove inferior to the guarantee, a fair allowance to be made." The sample was of "Long-staple Salem" cotton: the cotton tendered was "Western Madras" cotton, which was found in the case to be inferior in kind and price to Salem cotton, requiring different machinery, and not to be in accordance with the sample. The defendants rejected the cotton, and the question to be decided on the above facts was whether they were entitled so to reject it. The Court held that, as the property had not passed upon the sale, the question was whether the thing tendered was the thing bought by them; was there a mere difference in value, which could be compensated for under the allowance-clause, or was it an essential difference in the species, so that the contract was for one thing and the article tendered another? It was held that there was a difference *in kind*, that the allowance-clause only referred to *quality*, and, therefore, the defendants were justified in not accepting the cotton.]

114. Where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose.

Warranty
where goods ordered
for a specified
purpose.

Illustration.

B orders of A, a copper manufacturer, copper for sheathing a vessel. A, on this order, supplies copper. There is an implied warranty that the copper is fit for sheathing a vessel.

[This rule and that affirmed by the last section are thus stated in *Jones v. Just* (b):—"it must be taken as established that, on the sale of goods by a manufacturer or dealer to be applied to a

(a) L. R., 2 C. P., 431.

(b) L. R., 3 Q. B., 197, at p. 203.

particular purpose, it is a term in the contract that they shall reasonably answer that purpose, and that, on the sale of an article by a manufacturer to a vendee who has not had the opportunity of inspecting it during the manufacture, it shall be reasonably fit for use, or shall be merchantable, as the case may be."

In another case, whiskey was sold by certain distillers to be used by the purchasers in barter with the natives of the West Coast of Africa, which purpose was communicated to the sellers. The spirits turned out to be coloured with logwood in a manner which, though it did not make them positively injurious to health, so dyed the excretions of those drinking them as to make them the colour of blood. This had the effect of alarming the natives and making the spirits unsaleable. It was held on appeal that the implied warranty of fitness for the specified purpose was not complied with (a). It is to be observed that neither this nor the preceding section is qualified by any provision as to the character in which the vendor sells, or as to opportunities of inspection afforded to the buyer, on which much stress seems to be laid in the English cases (b). It follows, therefore, that any dealer of whom goods are ordered for a purpose for which goods of the description mentioned are usually ordered, is bound to supply goods fit for that purpose and merchantable under that description. A breach of this promise on his part gives the buyer an option to reject the goods tendered under Section 118. A person selling noxious articles compounded by himself may further render himself liable to an action for tort (c).]

Warranty on
sale of article of
well-known as-
certained kind.

115. Upon the sale of an article of a well-known ascertained kind, there is no implied warranty of its fitness for any particular purpose.

Illustration.

B writes to A, the owner of a patent invention for cleaning cotton,—"Send me your patent cotton-cleaning machine to clean the cotton

(a) *Macfarlane v. Taylor*, L. R., 1 H. L., Sc. Ap., 245.

(b) *Brown v. Edginton*, 2 M. & G., 279.

(c) *George v. Skivington*, L. R., 5 Ex., 1.

at my factory." A sends the machine according to order. There is an implied warranty by A that it is the article known as A's patent cotton-cleaning machine, but none that it is fit for the particular purpose of cleaning the cotton at B's factory.

[The distinction between this and the preceding section is, that in the one case the buyer trusts to the judgment and skill of the seller to supply him with goods fit for the purpose for which such goods are usually sold, and which, therefore, the seller must be presumed to know, while in the other case he buys on his own judgment a specific article in the belief that it will answer his purpose, and if he is disappointed he has only himself to blame for it. Therefore, "where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer" (a).

This rule is applicable where a specific agreed thing is sold, as in *Barr v. Gibson* (b), where the sale of a ship was in question, and it was held that though the sale of a chattel, as being of a particular description, implied a contract that the article sold was of that description, yet, that condition being complied with, the property passed to the purchaser, notwithstanding that the ship was damaged, unseaworthy or incapable of being beneficially employed. It also applies where, as in the Illustration, the selection of the thing is left to the seller.]

116. In the absence of fraud and of any express warranty of quality, the seller of an article which answers the description under which it was sold is not responsible for a latent defect in it.

Seller when
not responsible
for latent defects.

Illustration.

A sells to B a horse. It turns out that the horse had, at the time of the sale, a defect of which A was unaware. A is not responsible for this.

(a) *Chanter v. Hopkins*, 4 M. & W., 399, cited in *Jones v. Just*, L. R., 3 Q. B., at p. 202.

(b) 3 M. & W., 390.

[If the article tendered corresponds to the description under which it was sold, so as to comply with the warranty provided by Section 113, the fact that it has a latent defect does not, in the absence of fraud, give the buyer any right to complain. This rule is in fact illustrated by the case of *Barr v. Gibson* cited in the preceding note, for there, the state of the ship, sold while at sea, was equally unknown to both parties. The section is in accordance with the English rule laid down by Lord Ellenborough in *Baglehole v. Walters* (a), where it was held that the buyer was not entitled to repudiate the sale on account of a latent defect, which the seller knew, but used no means to conceal. The Illustration, however, narrows the effect of the section, because it states that the seller was unaware of the defect.

The case of *Horsfall v. Thomas* (b) was decided on the ground that the purchaser was not deceived by the concealment of a defect in the article purchased, inasmuch as he had never inspected it before purchase, although an opportunity of inspection was given: this decision, however, has been questioned (c); and there can be no doubt that such a concealment, if it had been instrumental in inducing the contract, would render it voidable under the present Act on the ground of fraud.

This section also is unqualified by any provision as to the buyer's having an opportunity of inspecting the thing bought.]

117. Where a specific article, sold with a warranty, has been delivered and accepted, and the warranty is broken, the sale is not thereby rendered voidable; but the buyer is entitled to compensation from the seller for loss caused by the breach of warranty.

Buyer's right
on breach of
warranty.

Illustration.

A sells and delivers to B a horse, warranted sound. The horse proves to have been unsound at the time of sale. The sale is not

(a) 3 Camp., 154.

(b) 31 L. J., Ex., 322, see *ante*, page 75.

(c) *Smith v. Hughes*, L. R., 6 Q. B., at p. 605

thereby rendered voidable, but B is entitled to compensation from A for loss caused by the unsoundness.

[This section seems to lay down a different rule as to the right of rejecting goods which do not comply with a warranty, from that which obtains in England. After the ownership of a specific article has once passed to the buyer, he cannot, according to English law, repudiate the sale: he is bound to pay the price, having his action for the breach of warranty (*a*). Only when the warranty has, by the agreement of the parties, been constituted a condition on which the sale depends, can a specific article be returned after delivery on its appearing that the warranty is not complied with. Then in fact the sale is not absolute, but only conditional (*b*). According to this section, it is not the passing of the property or the delivery that determines the buyer's right of rejection, but his receipt and acceptance of the goods.

As to the meaning of acceptance, see note to next section.]

118. Where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may

accept the goods or refuse to accept the goods when tendered,

or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them; provided that, during such time, he exercises no other act of ownership over them than is necessary for the purpose of examination and trial (1).

In any case the buyer is entitled to compensation from the seller for any loss caused by the breach of

Right of buyer on breach of warranty in respect of goods not ascertained.

(a) *Street v. Blay*, 2 B. & Ad., 456.

(b) *Cutter v. Powell*, 2 Sm. L. C., 30.

warranty ; but if he accepts the goods and intends to claim compensation, he must give notice of his intention to do so within a reasonable time after discovering the breach of the warranty (2).

Illustrations.

(a.) A agrees to sell and, without application on B's part, deliver to B 200 bales of unascertained cotton by sample. Cotton not in accordance with sample is delivered to B. B may return it if he has not kept it longer than a reasonable time for the purpose of examination.

(b.) B agrees to buy of A twenty-five sacks of flour by sample. The flour is delivered to B, who pays the price. B, upon examination, finds it not equal to sample ; B afterwards uses two sacks, and sells one. He cannot now rescind the contract and recover the price, but he is entitled to compensation from A for any loss caused by the breach of warranty.

(c.) B makes two pairs of shoes for A by A's order. When the shoes are delivered, they do not fit A. A keeps both pairs for a day. He wears one pair for a short time in the house, and takes a long walk out of doors in the other pair. He may refuse to accept the first pair, but not the second. But he may recover compensation for any loss sustained by the defect of the second pair.

[(1.) This section is in exact accordance with the English rule mentioned in the last note, that the buyer has an option to repudiate the sale at any time before the ownership has passed to him. Of this option he is not deprived by the mere fact of the goods being delivered to him, for in this section a distinction is made between delivery and acceptance. The buyer is entitled to have the goods in his custody for the purpose of testing whether they comply with the warranty, and for that purpose he may, if necessary, use them ; but if he keeps them longer than is necessary, or uses them in a manner which is not necessary, he is held to have signified his approval of them, and, therefore, to have accepted them (a). Where, therefore, a buyer had attempted to re-sell the goods in his own name, he was held to be deprived of his right to reject them as not complying with a

(a) *Heilbutt v. Hickson*, L. R., 7 C. P., 438.

warranty (*a*). "I think it clear that" (to quote the words of Erle, J.) "if, after goods have arrived, the vendee does any act to the goods, of wrong if he is not owner of the goods, and of right if he is owner of the goods, the doing of that act is evidence that he has accepted them" (*b*). So, if the buyer alters, or performs any additional work upon, the thing, his conduct is evidence of acceptance (*c*).

By English law a buyer, where there has been a breach of warranty, has a third course open to him. If he has not paid the price of the goods, he may, on an action being brought against him, plead the breach of warranty in reduction of damages (*d*).

According to the English cases, if the buyer fails to return the goods, or to notify to the vendor the defect in quality, there is a strong presumption that his complaint is not well founded. This section in effect lays down a similar rule in obliging the buyer to give notice within reasonable time of his intention to claim compensation for breach of warranty. His neglect to give such notice amounts to a waiver.

(2) The measure of the damages for breach of warranty which a purchaser who elects to accept the goods may recover, is the difference between the value of the goods delivered and of those warranted. The fact, therefore, that a rise in the market has made the inferior article sell for the price agreed on at the original sale is immaterial (*e*). Evidence may be given of a re-sale of the goods, before discovery of the breach of warranty, in order to show the value of the goods as warranted; and of a re-sale after discovery, at a reduced price, in order to show the real value of the goods (*f*). If at the time of the sale the seller knew that it was for the purpose of re-sale, he may be liable for special damage arising from the non-completion of the re-sale owing to the breach of warranty (*g*). Where the buyer of a horse re-sold it with the same warranty as he received with it from his vendor, and was sued on account of a breach of the warranty, it was held that he, having

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- (*a*) *Chapman v. Morton*, 11 M. & W., 534.
 - (*b*) *Parker v. Wallis*, 5 E. & B., 21.
 - (*c*) *Maberley v. Sheppard*, 10 Bing., at p. 101.
 - (*d*) *Mondel v. Steel*, 8 M. & W., 858.
 - (*e*) *Jones v. Just*, L. R., 3 Q. B., 197.
 - (*f*) *Clare v. Maynard*, 6 A. & E., 519.
 - (*g*) *Dingle v. Hare*, 29 L. J., C. P., 143.

offered his vendor the option of defending the action, and then having defended it himself and failed, might recover the costs as damages against his vendor (a).

More recently, however, it has been decided that the costs incurred by the plaintiff in defending an action on a contract made between him and a third person, and separate from and independent of that made between him and the defendant, are not recoverable as damages when the defendant has refused to defend the action. He is not liable for them as having authorized the plaintiff to incur them, and they are not the natural and necessary consequences of his default (b).]

MISCELLANEOUS.

119. When the seller sends to the buyer goods

When buyer may refuse to accept, if goods not ordered are sent with goods ordered.

not ordered with goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from the goods not ordered.

Illustration.

A orders of B specific articles of china. B sends these articles to A in a hamper, with other articles of china which had not been ordered. A may refuse to accept any of the goods sent.

[This section is applicable, both in cases where there is a sale of a specific article, and also in those where the vendor has, under Section 83 or 84, authority to select goods and appropriate them to the buyer. According to the English cases the rule is that, if the vendor sends either more or less than is ordered, there has been no complete appropriation, and, therefore, the buyer is not bound to accept any of the goods sent (c). Thus, where an order

(a) *Lewis v. Peake*, 7 Taunt., 152.

(b) *Baxendale v. London Chat. & Dov. Ry. Co.*, L. R., 10 Ex., 35, overruling *Mors-le-Blanch v. Wilson*, L. R., 8 C. P., 227.

(c) *Cunliffe v. Harrison*, 6 Ex., 903.

was given for ten hogsheads of claret, and the vendor sent fifteen, it was held that, as the goods ordered were undistinguishable from those not ordered, an action would not lie for the price against the purchaser who refused to accept any of them, "for the person to whom they are sent cannot tell which are the ten that are to be his, and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him." Again, in *Levy v. Green* (a), where the order was for specific articles of earthenware, and other articles were sent with those ordered, it was held that, though the articles sent in excess of the order were perfectly distinguishable, yet that the vendor was not entitled to throw upon the purchaser the risk and trouble of unpacking them. He was, therefore, entitled to reject the whole parcel. On a similar principle it has been held that a buyer is not bound to accept a less quantity than he ordered; if he has stipulated for a cargo (b), he is not bound to take part of a cargo. The effect of this section is to limit the buyer's right to refuse acceptance, where more than the goods ordered are sent, to the case where, as in the Illustration, risk or trouble is involved in separating the goods ordered from those not ordered. Where less than the goods ordered have been sent, there has been no performance of the contract, and the buyer may refuse, on this ground, to accept the goods.]

120. If a buyer wrongfully refuses to accept the goods sold to him, this amounts to a breach of the contract of sale.

Effect of wrongful refusal to accept.

[That is, where the refusal to accept is not justified under Section 118, or on the ground of delivery at a wrong time or place, or of some other failure to comply with the terms of the contract, or on the ground of the contract being void or voidable.]

(a) 27 L. J., Q. B., 111; 28 *ib.*, 319.

(b) *Kreuger v. Blanck*, L. R., 5 Ex., 179; but see *Ireland v. Livingston*, L. R., 5 H. L., 395.

121. When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract on the buyer's failing to pay the price at the time fixed, unless it was stipulated by the contract that he should be so entitled.

Right of seller
as to rescission,
on failure of buyer
to pay price
at time fixed.

[Section 107 provides for certain cases in which the vendor may re-sell the goods the possession of which he has either resumed or never abandoned. This section declares that, when the buyer has once acquired possession, the goods cannot be re-taken from him though he fail to pay the price. This proposition was treated as indisputable in *Page v. Cowasjee Ekhuljee (a)*.]

122. Where goods are sold by auction, there is a distinct and separate sale of the goods in each lot, by which the ownership thereof is transferred as each lot is knocked down.

Sale and trans-
fer of lots sold
by auction.

[From the language of this section it is to be inferred that, until the hammer falls, either buyer or seller may withdraw his offer, for that is the agreed means of communicating acceptance on either side (see Section 5). In cases, however, in which sales by auction are announced as being "without reserve," it has been held in the English Courts that the matter stands on the same footing as promises of a reward made by the owner of lost property to whoever finds it, or other offers to the public at large, and that, consequently, the highest *bonâ fide* bidder, having accepted the offer, can sue the auctioneer in respect of it. "We think," observed the Court in *Warlow v. Harrison (b)*, "that the auctioneer who puts property up for sale upon such a condition, pledges himself that the sale shall be without reserve, or, in other words, contracts that it shall be so, and that *this contract is made with the highest bonâ fide bidder*, and in case of a breach of it, that he has a right of action against the auctioneer." In that

(a) L. R., 1 P. C., at p. 145.

(b) 29 L. J., Q. B., at p. 15.

event the auctioneer would in his turn be entitled to be indemnified by his principal, Section 222. But in *Harris v. Nickerson* (a), recently decided in the Queen's Bench, distinction was drawn between cases such as *Warlow v. Harrison* and ordinary sales by auction, and it was distinctly ruled that an auctioneer who advertises certain goods for sale by auction and then withdraws them, is not liable to persons who have been induced by the advertisement to attend the sale for the expenses which they have incurred in so doing. A person who advertises for tenders of contracts stands in much the same position as an auctioneer. He is not bound to accept the lowest tender. In either case it is from one of the public addressed, and not from the advertiser or auctioneer, that the offer comes (b).]

123. If, at a sale by auction, the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer.

Effect of use, by seller, of pretended biddings to raise price.

[A vendor who employs a person to make pretended biddings, in other words, a puffer, is guilty of a fraud on the bidders. To them the puffer's bid appears to be, what it is not, a real bidding; for the arrangement between the vendor and the puffer is, that the latter's bid is to go for nothing. The effect of this section is to give the bidder who, after buying goods at an auction, discovers that the biddings were raised by pretended biddings, the right of repudiating the sale. The section does not appear to take away the seller's right to withdraw his offer, even if his withdrawal is conveyed in the form of buying in the goods. If, however, the auction is "without reserve," the auctioneer might be exposed to an action at the suit of the highest bidder. As to "pretended biddings to raise the price," a bid made by an owner or his agent, other than a bid for the purpose of buying in goods, would be a pretended bidding, and would entitle a subsequent bidder to avoid the sale.

(a) L. R., 8 Q. B., 286.

(b) *Spencer v. Harding*, L. R., 5 C. P., 561.

The English law as regards the employment of "puffers" at auction-sales of land has been recently declared by 30 & 31 Vic., c. 48.

It has been held by the Madras High Court, that an auctioneer who is instructed to sell goods, a price being reserved, may buy them in himself at that price and sell them again for his own benefit at a higher price. His employer has no action against him, unless actual fraud is proved.]

CHAPTER VIII.

OF INDEMNITY AND GUARANTEE.

124. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity.

Contract of
'indemnity' de-
fined.

Illustration.

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

[The contracts dealt with in this Chapter belong to the general class of contingent contracts, the contingency upon which they depend being the conduct or default of the promisor or some third person. Contracts of indemnity, as understood in this Act, do not, therefore, comprise what in English law are the commonest instances of contracts of indemnity, namely, contracts of insurance.]

125. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—

Rights and li-
abilities of indem-
nity-holder when
sued.

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies (1);

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit (2);

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

[(1) Sections 145 and 222, with their Illustrations, explain what are the limits of the promisee's authority under this contract. Another instance is given in the note to Section 118, where the purchaser, by reason of a breach of warranty, is cast in damages at the suit of his sub-purchaser. Such damages are regarded as the measure of the loss against which the vendor has undertaken to indemnify the purchaser.

(2) The costs, however, for which the purchaser becomes liable in such a suit are not recoverable, unless under the conditions prescribed in sub-section (2). In the case cited under Section 118, notice to the vendor of the suit, and acquiescence by him in its defence, was held to entitle the purchaser to recover the costs incurred by him in the defence of the suit brought against him. An authority to defend a suit is generally presumed where notice of an intention so to do has been given to the promisor and he has refrained from interference (a); but mere notice to the promisor of a suit having been brought does not, in the absence of other justifying circumstances, give the promisee a right to defend it and to put the promisor to useless expense.

(a) *Blyth v. Smith*, 5 *Man. & G.*, 618; *Gillett v. Rippon, Moo. & M.*, 406.

If the facts are such that a prudent, unindemnified man would have paid the money and stopped the suit, the promisee will not be entitled to recover the costs. When the promisee has acted within the scope of his authority in defending a suit, he can recover costs paid by him as between attorney and client as well as his taxed costs. This was held in a case where a lessee brought an action against the assignee of his lease for breach of a contract to indemnify the lessee against a failure to perform the covenants in the lease (a).

Where trustees lent money to the defendant, taking an indemnity in case the loan was not justified, a bill was filed against them to invest the money which they had lent. They called on defendant to come in and defend, and on his refusal consented to a decision of the Court being passed at once as to the propriety of the loan. It was held that their claim on the indemnity was unaffected by the procedure adopted (b).]

126. A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the 'surety;' the person in respect of whose default the guarantee is given is called the 'principal debtor,' and the person to whom the guarantee is given is called the 'creditor' (1). A guarantee may be either oral or written (2).

[(1) This contract pre-supposes the existence of a separate obligation actually existing, or about to be incurred, by some third person whose creditor desires to have the additional security which the promise of the surety gives him. There can be no guarantee unless there be a principal debtor, and, therefore, a promise to pay if some third person who is not liable fails to pay, does not make the promisor liable as a surety, but makes

(a) *Howard v. Lovegrove*, L. R., 6 Ex., 43.

(b) *Lord Newborough v. Schröder*, 7 C. B., 342.

him primarily liable in respect of his promise (a). The promise of a surety is to discharge the liability of the third person, i. e., the principal debtor, and therefore the surety's liability is, unless it is otherwise provided by the contract, co-extensive with that of the principal debtor, see Section 128.

A suit may be maintained against a surety although the principal debtor has not been sued (b). He is not entitled to a demand for payment, upon default of the debtor, unless there is an express stipulation for it (c).

(2) This provision has reference to 29 Car. II, c. 3, Section 4, which required a promise to answer for the debt, default or miscarriage of another person to be in writing and signed by the party to be charged therewith or some person by him lawfully authorized thereto.]

127. Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Consideration
for guarantee.

Illustrations.

(a.) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.

(b.) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c.) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

[The consideration for a guarantee does not differ from the consideration for any other promise. It may consist of something done or of a promise to do something, and the thing done or promised may be either something from which the surety,

(a) *Mountstephen v. Lakeman*, L. R., 5 Q. B., 613; 7 *ib.*, 196; 7 H. L., 17.

(b) *Dewan of Cochin v. Kurusingal*, 4 Mad. H. C., 190.

(c) *Sicklemore v. Thistleton*, 6 M. & S., 9.

the principal debtor, or another person derives advantage, or it may be something from which the principal creditor sustains loss or inconvenience. Thus, in Illustration (a), the benefit to B from the delivery of the goods is consideration for C's promise. But if C's promise had been made subsequently to, and independently of, the delivery, and the delivery had not been made in the first instance at C's desire, there would be no consideration for C's promise. This section should be read with Section 2. cl. (d); its object is to guard against the supposition that benefit to the surety himself is necessary in order to support the consideration for his promise, see *Morley v. Boothby* (a), cited in note to Section 2. A mere agreement by the plaintiff at defendant's request to supply goods to a third party is too indefinite to form good consideration for a guarantee; but any goods supplied on credit subsequently to the agreement of guarantee, may be taken to be supplied at the defendant's request, and then a good consideration for the guarantee is raised (b).

Where N advanced money to K on a bond hypothecating K's property, and mentioning M as surety for any balance that might remain due after realization of K's property, M being no party to K's bond, but having signed a separate surety-bond two days subsequent to the advance of the money, it was held that the subsequent surety-bond was void for want of consideration under this section (c).]

128. The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Surety's liability,

Illustration.

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonored by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it.

(a) 3 Bing., 107.

(b) *Morrell v. Cowan*, 6 Ch. D., 166, at p. 171, reversed on appeal, 7 Ch. D., 151, on the ground that the guarantee was limited to goods supplied after it was given; but the decision of the Lower Court on the question of consideration was upheld, see Bagallay, L. J., remarks at p. 155.

(c) *Nanak Ram v. Mehin Lal*, I. L. R., 1 All., 487.

129. A guarantee which extends to a series of transactions, is called a continuing guarantee.

Illustrations.

(a.) A, in consideration that B will employ C in collecting the rents of B's zamindari, promises B to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C of those rent. This is a continuing guarantee.

(b.) A guarantees payment to B, a tea-dealer, to the amount of £100, for any tea he may from time to time supply to C. B supplies C with tea to above the value of £100, and C pays B for it. Afterwards, B supplies C with tea to the value of £200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of £100.

(c.) A guarantees payment to B of the price of five sacks of flour to be delivered by B to C and to be paid for in a month. B delivers five sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay for. The guarantee given by A was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks.

[Whether a guarantee is intended to be continuing is a question to be decided "not upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guarantee was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about" (a).]

B became surety under bond to Government for the treasurer of a collectorate. The Collector yearly examined the accounts, and struck a balance which he certified to be correct. B on each such occasion executed a new bond, but the old bonds were not cancelled or given up. On subsequent enquiry, the treasurer was discovered to have embezzled moneys during each year. It was held that, on such discoveries being made, B was still liable under the old bonds, there having been no novation (b).]

(a) *Heffield v. Meadows*, 4 C. P., 595; *Wood v. Priestner*, L. R., 2 Ex., 66, 282; *Laurie v. Scholefield*, L. R., 4 C. P., 622; *Coles v. Pack*, L. R., 5 C. P., 65.

(b) *Lala Banshidhar v. The Government of Bengal*, 9 B. L. R., 364.

130. A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Revocation of continuing guarantee.

Illustrations.

(a.) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But A is liable to B for the 2,000 rupees, on default of C.

(b.) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.

[A continuing guarantee consists in fact of a series of offers to guarantee, which may be retracted at any time before the principal debtor has incurred an obligation to the creditor in respect of the guaranteed matter: but this revocation does not affect the surety's liability in respect of obligations previously incurred. As to the effect of concealment during the existence of a continuing guarantee, see note to Section 143.]

131. The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

Revocation of continuing guarantee by surety's death.

[The surety's representatives are bound by his promise in respect of guaranteed transactions occurring before his death, but that event operates as a revocation of the offer to guarantee future transactions, although the creditor may have entered into them without notice of the event. In English law the rule seems to be different, for in *Bradbury v. Morgan* (a), the Court held that a surety's executor was liable on a guarantee in respect

(a) 31 L. J., Ex., 462.

of transactions occurring after the surety's death and before any notice of revocation had been given to the creditor.]

132. Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Liability of two persons, primarily liable, not affected by private arrangement between them as to suretyship.

Illustration.

A and B make a joint and several promissory note to C. A makes it, in fact, as surety for B, and C knows this at the time when the note is made. The fact that A, to the knowledge of C, made the note as surety for B, is no answer to a suit by C against A upon the note.

[This follows from the general rule that the rights and liabilities of parties to a contract depend upon its terms and are not affected by other contracts to which the same persons are not parties. In the English Courts it has been held (a) that a creditor, having notice that the relation of principal and surety exists between his co-debtors, is affected by the consequences of that relation.

A party who accepts bills of exchange for the accommodation of another, is not precluded by this section from pleading that he was an accommodation acceptor only (b).]

133. Any variance, made without the surety's consent, in the terms of the contract between the principal and the creditor, discharges the surety as to transactions subsequent to the variance.

Discharge of surety by variance in terms of contract.

(a) *Wythes v. Labouchere*, 3 De G. & J., 593.

(b) *Pogose v. Bank of Bengal*, 1 L. R., 3 Cal., 174.

Illustrations.

(a.) A becomes surety to C for B's conduct as a manager in C's bank. Afterwards, B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on over-drafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b.) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later Act.

(c.) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A's becoming surety to C for B's duly accounting for monies received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary. A is not liable for subsequent misconduct of B.

(d.) A gives to C a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C to B on credit. Afterwards B becomes embarrassed, and, without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready-money, and that the payments shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e.) C contracts to lend B 5,000 rupees on the first March. A guarantees repayment. C pays the 5,000 rupees to B on the first January. A is discharged from his liability, as the contract has been varied, inasmuch as C might sue B for the money before the first of March.

[This and the three following sections provide that any variance in the contemplated relations of the parties shall discharge the surety. He only bargains for the debtor's liability for a particular debt or obligation, and, therefore, if any variation is made in the terms of the debtor's liability, the position of the surety is different from what he contemplated, and he is released (a). Thus, where, on goods being sold by the plaintiff

(a) *Bonser v. Cox*, 4 Beav., 383; *Rees v. Berrington*, 2 W. & T. L. C., 5th Edn., 992.

to another, and the payment being guaranteed by the defendant, the plaintiff and his vendee privately agreed that the vendee should pay something beyond the market-price in order to liquidate an old debt, it was held that defendant was discharged from his liability (a). If the guarantee be for a loan, or for the sale of goods, the transaction must be strictly of that nature (b). Where a person is surety for another in two distinct matters, *e. g.*, for A B, as collector of poor-rates and as collector of sewers rates, an alteration of the debtor's duties in one matter does not discharge the surety as to the other (c); and generally, if by any voluntary and deliberate act of the creditor the contract between him and the debtor is altered, so that it cannot be carried out in the way intended, the surety is discharged. It is immaterial that the alteration relates to a matter which, though standing as security for the whole, is of less value than the whole debt. The surety's consent to an act which, if done without his consent, would discharge him, cannot be implied from the mere fact of his knowledge of it and his silence (d). But it may be implied from the circumstances: thus, in *Leathley v. Spyer* (e), the guarantee was originally given for debts to be contracted by J S. Subsequently J S took a partner into his business and the guarantee was cancelled. Another guarantee was afterwards given by the same sureties in the terms of the former. It was held that it must be read in the light of the circumstances under which it was given, and that it therefore extended to debts incurred by J S in his partnership-business.

This section carries the rule as to the effect of a variance of a contract in discharging the surety further than the English decisions go. In a case recently decided in the Exchequer (f), the plaintiff, the employer of a clerk, sued the surety in respect of the clerk's default, and the pleas were, first, that by the original agreement between the employer and the clerk the engagement

(a) *Pidcock v. Bishop*, 3 B. & C., 605.

(b) *Glyn v. Hertel*, 8 Taunt., 208; *Evans v. Whyte*, 5 Bing., 485.

(c) *Skillett v. Fletcher*, L. R., 1 C. P., 217; 2 C. P., 469; *Harrison v. Seymour*, 1 C. P., 518; *Frank v. Edward*, 8 Ex., 214.

(d) *Polak v. Everett*, 1 Q. B. D., at p. 673.

(e) L. R., 5 C. P., 595.

(f) *Sanderson v. Aston*, L. R., 8 Ex., 73.

was to be terminable by one month's notice, and that, afterwards, there had been an agreement between the employer and clerk that it should be terminable only on three months' notice; and secondly, that the clerk had previously made other defaults, and that the plaintiff had, after knowledge of such defaults, continued the service: a majority of the Court held that the first of these two pleas was bad, inasmuch as it did not appear that the condition as to the length of notice had been imported into the surety's contract, or that he had contracted on the strength of it, or that the new condition really added to the surety's risk. As to the second of the two pleas, the Court were unanimous in holding it good on the authority of *Phillips v. Foxall* (a). Under the present section it will be observed that the only question would be whether there had been a variance without the surety's consent, and that the first plea, accordingly, would be good in an Indian Court. The acceptance, however, by the creditor, of a new security from the debtor, unaccompanied by a contract to give time or any other variance in the terms of the contract, does not discharge the surety (b.)]

134. The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Discharge of
surety by release
or discharge of
principal debtor.

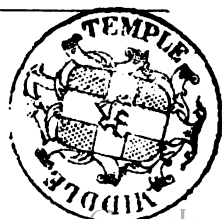
Illustrations.

(a.) A gives a guarantee to C for goods to be supplied by C to B. C supplies goods to B, and afterwards B becomes embarrassed and contracts with his creditors (including C) to assign to them his property in consideration of their releasing him from their demands. Here B is released from his debt by the contract with C, and A is discharged from his suretyship.

(b.) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for

(a) L. R., 7 Q. B., 666.

(b) *Bell v. Banks*, 3 M. & G., 258.



the irrigation of A's land, and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

(c.) A contracts with B for a fixed price to build a house for B within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

["It results," says Pothier, "from the definition of a surety's engagement, as being accessory to a principal obligation, that the extinction of the principal obligation necessarily induces that of the surety; it being of the nature of an accessory obligation that it cannot exist without its principal" (a). It matters not how the principal obligation is discharged; it may be by a breach of contract on the creditor's part, which operates under Sections 39, 53 or 54, or by some transaction under Section 62 or 63; anything which puts an end to the guaranteed debt also determines the surety's liability. It is on the same principle, viz., the entirety of the obligation, that a release in English law of one co-promisor operates as a release of all (b). The rule may also be put upon the less technical ground that, if the release of the surety did not follow from that of the debtor, the latter's release would be purely illusory, because the consequence would be, that the surety, on being compelled to pay, would immediately turn round on the debtor (c). The creditor taking a second security in satisfaction of the first, discharges the surety (d).]

In a recent case a promissory note was made by two persons, as principal and surety, and was paid by the principal. The payment was subsequently set aside by the principal's assignees under the provisions of the Bankruptcy Act, and the money was returned by the payee. It was held that the payee had not lost his remedy against the surety (e). The *ratio decidendi* was that the creditor, having innocently accepted a payment which he was not entitled to refuse, had done nothing against the faith of the contract with the surety, and that, as the whole transac-

(a) Vol. I., p. 235 [377].

(b) *Nicholson v. Revill*, 4 A. & E., 675; *Kearsley v. Cole*, 16 M. & W., 128.

(c) *Webb v. Hewitt*, 3 K. & J., 438; *Nevill's case*, L. R., 6 Ch. App., 43.

(d) *Clarke v. Henty*, 3 Y. & C., Ex., 187.

(e) *Petty v. Cooke*, L. R., 6 Q. B., 790.

tion had been cancelled, no release of the debtor had in fact taken place.

Nothing is said in this section as to the surety's assent to a discharge, or as to the reservation of rights against sureties. A reservation of the creditor's rights against the surety would not, therefore, alter the effect of the release of a debt in discharging the surety. If the surety consented to remain liable when the principal debtor was discharged, he would himself become the principal debtor. In the English Courts it is now established that a release, containing a reservation of remedies against the surety, is to be construed as a covenant not to sue the party released. In this manner the strict consequences of a release in discharging the other joint promisors are evaded. It is immaterial whether the surety is informed of the arrangement; for the release, so qualified, is allowed to operate only so far as the surety's rights are not thereby affected (a).

In *Cragoe v. Jones* (b), a guaranteed creditor had joined with other creditors in a composition with the debtor, whereby the debtor assigned his estate for the benefit of the creditors, and they discharged the debtor "in like manner as if he had obtained a discharge in bankruptcy." It was held that this had the effect of releasing the surety.]

135. A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.

[The last section having dealt with the case where the principal debtor is entirely released by the act or default of the creditor, this section is directed to the case where some arrangement is come to between the creditor and his debtor, which has the effect of lessening or postponing the debtor's liability, but not

(a) *Bailey v. Edwards*, 4 B. & S., at p. 774; *Price v. Barker*, 4 E. & B., 760; *Bateson v. Gosling*, L. R., 7 C. P., 9.

(b) L. R., 8 Ex., 81.

discharging it altogether. Here, the surety's assent becomes important. The rule of law, as stated in this section, is not quite in accordance with the existing English rule, according to which a creditor, in contracting to give time to the debtor, may reserve his rights against the surety; and the surety will not, in that case, be released, even though he has not been informed of the arrangement (a). Under this Act the surety's assent is necessary. On the other hand the section corresponds exactly to the rule laid down by Lord Eldon. "The rule is this—that, if a creditor, without the consent of the surety, gives time to the principal debtor, by so doing he discharges the surety, that is, if time is given by virtue of positive contract between the creditor and the principal—not where the creditor is merely inactive. And, in the case put, the surety is held to be discharged, for this reason, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal, or not; and because he, in fact, cannot have the same remedy against the principal as he would have had under the original contract It has been truly stated that the renewal of these bills might have been for the benefit of the surety; but the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is, or is not, for his benefit. The creditor has no right—it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety" (b). It is to be observed that the rule as laid down by Lord Eldon is regardless of the question whether the surety's interests are affected, and that the section follows it in omitting to notice such considerations. The tendency in the English Equity Courts has, however, been to modify the rule by the proviso that, unless the surety's interests are injuriously affected, a contract to give time to the debtor will not discharge the surety. Thus, in *Hulme v. Cole* (c), the creditor took from the debtor a *cognovit* in an action brought against him, with a stay of execution till a day earlier than that on which judgment could have been obtained in the regular course. It was contended that this

(a) *Webb v. Hewitt*, 3 K. & J., 438.

(b) *Samuell v. Howarth*, 3 Mer., 278.

(c) 2 Sim., 12.

was in effect giving time to the debtor, and so had the effect of discharging the surety. The Court, however, held that the real effect of the arrangement was to accelerate the creditor's remedy, and refused to regard it as discharging the surety. "The principle of discharging a surety by the giving of time by the creditor is," said the Vice-Chancellor, "a refinement of a Court of Equity, and I will not refine upon it." It rests on the ground that, by giving time to the principal debtor, the creditor does an act which is against good faith, and injurious to the surety; the doctrine should not be applied unless the surety has been injured (a).

In order to release the surety there must be a *contract* by the creditor not to sue: "a mere voluntary promise to give further time, not acted upon, and which cannot be enforced," will not do so, as it makes no alteration in the rights or position of the parties (b).

In *Combe v. Woolf* (c), the defendant guaranteed the payment for goods to be delivered to J. The custom of the plaintiff was to give six, or at most eight, months' credit; but the plaintiff allowed nine months to elapse, and then took a promissory note at two months, thus virtually giving J eleven months' credit. The Court held that the defendant was exonerated, because his situation was prejudiced by the plaintiff having precluded himself, by taking the note, from proceeding against J during its currency.

In *Wilson v. Lloyd* (d), the effect of a creditor's composition with a firm of the liability of an ex-partner for debts incurred by the firm during his partnership was discussed at length. The facts were these:—L and W, being partners, were jointly and severally liable on bond-debts to S. L and W took C into partnership and, subsequently, W retired, L covenanting to indemnify him against partnership-obligations. L and C becoming involved, a composition-deed with the creditors was executed, and S covenanted to postpone the payment of each instalment of the bonds till the end of two years. The composition-deed reserved

(a) *Per* Blackburn, J., *Petty v. Cooke*, L. R., 6 Q. B., at p. 795.

(b) *Philpot v. Briant*, 4 Bing., 717.

(c) 8 Bing., 156.

(d) 38 L. T., N. S., 331.

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the rights of the creditors against any sureties, but there had been no previous resolution to that effect. S knew of the dissolution of partnership, and that, as between W and L, L had become principal debtor on the bonds, and W surety. It was held that there had been a novation of the bond-debts, S accepting L and C as principals, and treating W as surety, and that by giving time to L and C, they had discharged W.

The mere fact that a creditor knows that the relationship of principal and surety exists between his debtors is not enough to affect him with any of the consequences of that relation; see Section 132. Where the relationship does not originally exist, joint debtors cannot, of course, subsequently, without the consent of the creditor, alter their relation to one of principal debtor and surety, so as to affect the rights of the creditor (a).

A creditor who receives from the debtor a payment of interest on the debt in advance virtually contracts with the debtor not to sue during the time in respect of which the interest is so prepaid: the surety is, accordingly, in such a case discharged.

Where a surety whose guarantee relates to an entire contract involving several performances at different times, is discharged by a dealing between the creditor and the debtor in respect of one of such performances, he is discharged. The obligation once dissolved cannot be renewed by subsequent acts to which he is no party (b).]

Surety not discharged when agreement made with third person to give time to principal debtor.

136. Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration,

C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

[This section merely declares that no contract which is not

(a) *Harjiban Das v. Bhagwan Das*, 7 B. L. R., 535.

(b) *Croydon Commercial Gas Co. v. Dickinson*, 1 C. P. D., 707.

made between the creditor and the principal debtor can have the effect of discharging the surety. The same principle is established in English law (a). A contract which the creditor makes with a third person not to sue the debtor, gives such third person a right of action, but does not affect the principal obligation, and, therefore, does not discharge the surety.]

137. Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Creditor's forbearance to sue does not discharge surety.

Illustration.

B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

[This section is also apparently inserted to prevent any misapprehension of the 135th Section. "The surety," said Lord Eldon in *Eyre v. Everett* (b), "has no right to say that he is discharged from the debt which he has engaged to pay, together with the principal, if all that he rests upon is the passive conduct of the creditor in not suing. He must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue, or to give him, the surety, the means of suing."

Although mere laches on the creditor's part does not, according to the English cases, discharge the surety, yet failure on his part to make the best of securities which he holds may cause a proportionate reduction of his claim against the surety (c). The language of section 141, which prescribes the creditor's duties in respect of securities, hardly seems to meet this case, and the distinction drawn in the English cases between mere laches as entitling the surety to a proportionate reduction of the claim against him, and a voluntary act as discharging the surety alto-

(a) *Frazer v. Jordan*, 8 E. & B., 303.

(b) 2 Russ., 381.

(c) *Wulff v. Jay*, L. R., 7 Q. B., 756.

gether, does not seem to be fully observed, see notes to Sections 133 and 141.]

138. Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

Release of one
co-surety does
not discharge
others.

[This proposition follows necessarily from that contained in Section 44, which applies to joint-promisors generally. According to English law, the joint obligation is regarded as entire, and is, therefore, discharged by the release of one promisor. Equity has, however, modified the effects of this rule by putting a fictitious construction upon instruments which purport to release one of several sureties: such instruments are, where the creditor's rights against the other sureties are reserved, treated as covenants not to sue, and consequently do not operate to discharge the other sureties.]

Under this section it is unnecessary for the creditor who desires to release one surety and at the same time to maintain the guarantee given by the other sureties, either to reserve his remedies against the latter or to obtain their consent.]

139. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Discharge of
surety by credi-
tor's act or omis-
sion impairing
surety's eventual
remedy.

Illustrations.

(a.) B contracts to build a ship for C for a given sum, to be paid by instalments as the work reaches certain stages. A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays to B the last two instalments. A is discharged by this prepayment.

(b.) C lends money to B on the security of a joint and several promissory note made in C's favour by B, and by A as surety for B,

together with a bill of sale of B's furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realized. A is discharged from liability on the note.

(c.) A puts M as apprentice to B, and gives a guarantee to B for M's fidelity. B promises on his part that he will, at least once a month, see M make up the cash. B omits to see this done as promised, and M embezzles. A is not liable to B on his guarantee.

[This Section, like sections 133 to 135, provides for the discharge of the surety under certain circumstances. The section is very vague in its wording and the illustrations afford but little assistance.

In the circumstances stated in Illustration (a), the surety would be discharged under Section 133. In Illustration (b), misconduct and wilful negligence on the creditor's part are supposed to exist, and it may be inferred that mere negligence on his part to make the best of the securities would not discharge the surety. According to the English cases, it would only entitle the surety to a proportional reduction of the claim against him.

Illustration (c) supposes a breach of a distinct promise made by the creditor. What are generally the rights of the surety and the duties of the creditor does not appear.

The section would, it is suggested, be more complete, if it provided that the dealings of the guaranteed creditor with his debtor should be conducted in the manner in which a person of ordinary prudence would conduct them, if he were not guaranteed, compare Section 125 (2).

The drawer of certain bills of exchange, after the acceptance thereof, being unable to meet his liabilities, executed a conveyance of all his property upon trust for the benefit of his creditors. The endorsees of these bills had also joined in the execution of the trust-deed. In a suit brought by them against the acceptor, the latter pleaded that he had only given his acceptance for the accommodation of the drawer;—it was held that, although the execution of the trust-deed by the plaintiffs was an act inconsistent with the rights of the surety, which, by the law of England, would have discharged him, still the trust-deed did not impair the "eventual remedy" of the defendant-acceptor, and that, therefore,

he was not discharged from his suretyship under the provisions of this section (a).]

140. Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

Rights of surety on payment or performance.

[This and the following sections declare the rights of the surety as against the creditor after he has discharged the guaranteed debt. Where, in consequence of the debtor's default, the surety has discharged the obligation, he is invested with the rights which the creditor had against the debtor. Thus, where a surety for a mortgage-debt paid off part of the debt, he was held entitled to a charge upon the estate for the amount (b). Where, in a case of insolvency, the debt has been proved by the creditor against the principal debtor's estate, and the surety afterwards pays it, the creditor invests the surety with his rights by becoming a trustee to him for the dividends which may be payable (c).

If the surety discharge the debt by a compromise, paying less than the full amount, he cannot make himself a creditor, as against the debtor, for the whole amount, but only for the amount actually paid (d). In this section it is to be observed that no distinction is made between securities existing at the time of the original contract and those subsequently acquired by the creditor; and this is in accordance with the English law (e).]

141. A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered

Surety's right to benefit of creditor's securities.

(a) *Pogose v. Bank of Bengal*, I. L. R., 3 Cal., 174.

(b) *Gedye v. Matson*, 25 Beav., 310.

(c) *Ex parte Rushforth*, 10 Ves., 409.

(d) *Reed v. Norris*, 2 My. & Cr., 361.

(e) *Pledge v. Buss, Johns.*, 663.

into, whether the surety knows of the existence of such security or not ; and if the creditor loses, or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations.

(a.) C advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also a further security for the 2,000 rupees by a mortgage of B's furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b.) C, a creditor, whose advance to B is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c.) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

[The preceding section having declared generally that the surety is to be invested with the creditor's rights, this section specifies the securities to which he is entitled, and states the results of any negligence on the creditor's part with regard to them. But a distinction is made between securities existing at the time when the contract of suretyship was entered into and those subsequently acquired. Negligence in respect of securities of the former class only will have the effect of discharging the surety. He is not discharged because the creditor chooses to surrender an after-acquired security, "What I apprehend as really the result of all these cases is this—You, the surety, may assert your rights actively whenever you please. When you assert them actively, the creditor will be obliged to hand over to you, on your paying him, all the securities he holds undisposed of. If they are securities held at the date of the original contract, you will be entitled to them absolutely, because it is a part of the original contract that your position shall not be altered. If they are subsequent, then your right and equity only arise from the time of your putting yourself in active motion, and not before"(a). As

(a) *Newton v. Chorlton*, 10 Hare, at p. 662.

to the duty of the creditor, the English cases lay down a more general rule than that prescribed by this section. The surety is *pro tanto* entitled to a reduction of the claim against him, if the creditor by his negligence fails to make the best of the securities held by him—if he loses them, or permits them to get into the debtor's possession, or fails to make them effectual by giving proper notice, or the like (a). He is chargeable like a mortgagee with all that he has or might have got out of the securities (b). The surety's right is to have the security in exactly the same condition as that in which it formerly stood in the creditor's hands (c). It is immaterial that the surety was not aware of the existence of the securities: so also, under Section 146, a surety's ignorance of the existence of other sureties does not affect his rights against them.

Where a continuing guarantee is given for the honesty of a servant, and the master, after discovery of misconduct, elects to continue the service, he has, by doing so without consulting the surety, discharged him, because he has deprived him of a right which he was entitled to have exercised for his protection (d).]

142. Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Guarantee obtained by misrepresentation invalid.

[This section has the effect of making *every* misrepresentation as to a material part of the transaction a ground for avoiding the contract in cases of guarantee. In the Exception to Section 19 it will be seen that in ordinary contracts misrepresentation is not invariably a ground of avoidance.

Thus, where a creditor so prepared a deed as to show on the face of it that it was intended to contain a joint and several covenant by two co-sureties, and sent it in that form to be executed by one of such sureties, but had not procured its execution

(a) *Strange v. Fooks*, 4 Giff., 408.

(b) *Wulff v. Jay*, L. R., 7 Q. B., 756.

(c) *Mayhew v. Crickett*, 2 Swanst., 185.

(d) Per Blackburn, J., *Phillips v. Foxall*, L. R., 7 Q. B., 666.

by the other surety, and had not informed the surety of this fact, but, on the contrary, had afterwards written to him as "one of the sureties;" it was held that the surety was entitled to be relieved from all liability (a).]

143. Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance, is invalid.

Guarantee obtained by concealment invalid.

Illustrations.

(a.) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.

(b.) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market-price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

[This and the preceding section enforce the principle of English law that "the intimate nature of the relation between the parties to the contract of suretyship requires that perfect good faith should be adhered to by them. Wherever, therefore, with the knowledge or assent of the creditor, there is any misrepresentation to, or even concealment from, the surety with regard to any material fact, which, had he been aware of, he might not have entered into the contract of suretyship, it will thereby be rendered invalid, and the surety will be discharged from his liabilities" (b). The present section, however, appears to impose on the creditor the duty of *volunteering* information as to every material circumstance affecting the guarantee. If this is its effect, it lays down a somewhat more stringent rule than that which is maintained in the English Courts. According to the English decisions it is not invariably the duty of the creditor to disclose every material circumstance, without enquiry by the surety; and a distinction is drawn between contracts of guarantee and contracts of marine insurance, where even innocent

(a) *Evans v. Bremridge*, 8 De G. M. & G., 101.

(b) 2 W. & T., L. C., 998.

concealment avoids the policy (a). Thus, in a case where the guarantee was for the debtor's cash-credit with a banker, the fact of the banker not communicating to the surety that the debtor had already overdrawn his account was held not to avoid the guarantee (b). In that case Lord Campbell pointed out that to hold the banker responsible in such instances for the disclosure of every material fact, without any inquiry on the part of the surety, would be to render transactions of the kind practically impossible, because the banker never could be sure that he had made all the necessary disclosures. The criterion, His Lordship said, as to whether a thing must be *voluntarily* disclosed, is the question whether it is something which might be naturally expected between the parties: if it is, the surety must put the question if he wants the information: if it is not, the creditor is bound to disclose it without enquiry. The English Courts, however, have often held that failure to communicate material facts may afford evidence from which the jury may infer fraud or misrepresentation on the creditor's part; so that the practical difference between the principle acted upon in England and that enforced by this section will not be very great. Thus, in a case where a Bank took a guarantee for the good behaviour of an agent, knowing at the time that he had misconducted himself, but not disclosing the fact to the surety, it was held that there was evidence of misrepresentation (c). So, again, concealment of the indebtedness of an agent by a coal-merchant who took a guarantee to secure the price of coals sold on his behalf by the agent, was considered sufficient evidence to support a verdict that the guarantee was obtained by fraud (d). This judgment was not, however, concurred in by all the members of the Court. But, where two persons untruly held themselves out as a regularly constituted joint-stock company, a guarantee given for money lent by them was held to be enforceable, as the misrepresentation concerning the company was immaterial and was not the real inducement to contract (e).

(a) *Wythes v. Labouchere*, 3 De G. & J., 593, at p. 609.

(b) *Hamilton v. Watson*, 12 Cl. & F., 109, at p. 119.

(c) *Smith v. Bank of Scotland*, 1 Dow, 272.

(d) *Lee v. Jones*, 34 L. J., C. P., 131.

(e) *Green v. Gosden*, 3 M. & G., 446.

The circumstance which the creditor must disclose may either be one which exists at the time of making the guarantee, or it may be something affecting the subsequent dealings between him and his debtor. For instance, an agreement between them to conduct their business in some unusual manner would be a material circumstance.

Concealment which, if it had been practised at the time when the contract was entered into, would have discharged the surety, would, in the case of a continuing guarantee, have a similar effect as to the future liability of the surety if practised during the continuance of the contract. On this principle it was held that default in disclosing the misconduct of a servant for whose honesty the defendant had given the plaintiff a continuing guarantee, discharged the defendant. The Court said,—“one of the reasons usually given for holding that such a concealment as we are here considering would discharge the surety from his obligations, is, that it is only reasonable to suppose that such a fact, if known to him, must necessarily have influenced his judgment as to whether he would enter into the contract or not; and in the same manner, it seems to us equally reasonable to suppose that it never could have entered into the contemplation of the parties that, after the servant's dishonesty in the service had been discovered, the guarantee should continue to apply to his future conduct, when the master chose for his own purposes to continue the servant in his employ without the knowledge or assent of the surety. If the obligation of the surety is continuing, we think the obligation of the creditor is equally so, and that the representation and understanding on which the contract was originally founded, continue to apply to it during its continuance and until its termination ” (a).]

144. Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Guarantee on agreement that creditor shall not act on it until co-surety joins.

(a) *Phillips v. Foxall*, L. R., 7 Q. B., 666, at p. 674.

[The principle of this section is the same as that implied in Section 133. If there is a variance of the contract between the creditor and his debtor, or if the contract between the creditor and surety is not perfected by the performance of one of its conditions, there is in either case an alteration in the nature of the obligation contemplated by the surety. The only difference is that, in the latter case, the surety's obligation never comes into existence, instead of being, as in the other case, avoided by a subsequent event. The same principle was applied in the case of *Bonser v. Cox* (a), where the surety stipulated that the debtor as well as himself should execute the bond. The Court held that, this stipulation not having been complied with, the surety was not bound.]

A separate oral agreement, constituting a condition precedent to the attaching of any obligation under a written contract, may be proved under the Evidence Act, Section 92, Prov. (3). An oral contract, such as that referred to in the section, might accordingly be proved, although the guarantee itself was in writing.]

145. In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety ; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

Implied promise
to indemnify
surety.

Illustrations.

(a.) B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

(b.) C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and, on A's refusal

(a) 4 Beav., 379.

to pay, sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c.) A guarantees to C, to the extent of 2,000 rupees, payment for rice to be supplied by C to B. C supplies to B rice to a less amount than 2,000 rupees, but obtains from A payment of the sum of 2,000 rupees in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

[This completes the series of sections which are intended to give the surety who has paid the guaranteed debt all the rights and remedies which belonged to the principal creditor. Although there is no express contract between the parties, the relation of surety and principal debtor gives rise to an implied promise on the part of the latter to indemnify the surety. The matters in respect of which contracts of indemnity may be enforced have been dealt with in Section 125 ; see notes thereto.]

146. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Co-sureties liable to contribute equally.

Illustrations.

(a.) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.

(b.) A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

[This section is an extension of the rule enacted by Section

43 with regard to joint promisors, to the case of persons who, without having made a joint promise, have guaranteed the same debt or duty. The two sections are, it is submitted, intended to be read together. The section is founded on the old case of *Dering v. Winchelsea* (a), which is still the leading authority on the point in the English Courts.

According to the rule adopted by the Common Law, if one of several sureties pays the whole debt and another becomes insolvent, the former can recover against each of the other co-sureties only an aliquot part of the whole, regard being had to the number of the co-sureties (b). This rule will, if the 43rd section be read along with this section, be abandoned in favour of that followed in Chancery, namely, that the remaining solvent sureties are bound, as between themselves, to contribute equally to the entire debt (c), as in Illustration (b) to Section 43. The co-sureties may, by contract among themselves, qualify their rights to contribution, or even exclude them altogether. Thus, where three persons became bound as sureties, and agreed that, if the principal debtor made default, they would pay their respective parts, and one of them became insolvent, and the second paid the whole debt, it was held that the third was bound to contribute only one-third of the whole debt (d). It may be the intention of the parties that a person becoming surety for a debt, for which the creditor already has another surety, shall not be liable as co-surety in the same degree with him, but as a supplemental surety in case both the principal debtor and the other surety fail to pay the debt. If such intention be expressed, the surety primarily liable will have no right to contribution against the person subsequently becoming surety (e).

Though the contracts by which the several co-sureties are bound may be distinct, the transaction in respect of which the guarantee is given must be the same: otherwise there is no contribution (f).

(a) 1 W. & T., L. C., 106.

(b) *Batard v. Hawes*, 2 E. & B., 287.

(c) *Mayor of Berwick v. Murray*, 26 L. J., Ch., 201.

(d) *Swain v. Wall*, Rep. in Ch., 150.

(e) *Craythorne v. Swinburne*, 14 Ves., 160.

(f) *Coope v. Twynam*, 1 Turn. & R., 426.

In cases coming under this section, each co-surety is primarily liable as against the creditor for the whole amount of the debt : as between themselves, they may qualify their rights to contribution as they please. The next section contemplates cases where co-sureties are liable as against the creditor in different amounts.]

147. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Liability of co-sureties bound in different sums.

Illustrations.

(a.) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are each liable to pay 10,000 rupees.

(b.) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 40,000 rupees. A is liable to pay 10,000 rupees and B and C 15,000 rupees each.

(c.) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B and C have to pay each the full penalty of his bond.

[This section determines the manner in which the creditor's right against co-sureties is affected by the fact of the co-sureties having bound themselves to him in different sums. Each co-surety is liable, notwithstanding the existence of other co-sureties, to the full extent of his guarantee. The section must be read with Section 43, which provides, in the case of joint promisors generally, that each joint promisor, in the absence of express agreement, is liable for the whole of his promise. A co-surety who has guaranteed a smaller amount than another cannot, accordingly, claim to pay a proportionately smaller amount of the entire debt. See note (2) to Section 43.]

Where one of several sureties has paid the amount to which his obligation is limited, he is entitled to all the rights of a surety who has paid the whole debt. Thus, where the debtor became bankrupt, it was held that each surety who had paid his share was entitled to such proportion of the dividend payable on the bankrupt estate as his share bore to the whole debt (a).]

CHAPTER IX.

OF BAILMENT.

148. A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the 'bailor.' The person to whom they are delivered is called the 'bailee' (1).`

Explanation.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment (2).

[(1) The main characteristic of the contract of bailment is that the delivery contemplated is for a temporary purpose, and that, when that purpose is accomplished, the identical article is to be returned or otherwise disposed of according to the bailor's directions. The goods bailed may, in the interval, be altered in form, as, for instance, corn by being converted into flour; still, if the owner has a right to have the same specific matter

(a) *Hobson v. Bass*, L. R., 6 Ch., 792.

re-delivered to him, the contract between him and the party holding it is one of bailment. Thus, where a farmer deposited corn with a miller, to be stored and used as part of the miller's consumable stock, and it was by him mixed with other corn of like sort deposited by other farmers for the like purpose, subject to the right of the farmers to claim at any time an equal quantity, without reference to any specific bulk from which it was to be taken, or in lieu thereof the market-price of a like quantity, it was held that the transaction amounted to a sale, and was not a bailment (*a*).

The bailee having sold the things originally bailed may, however, by his own conduct, appropriate to the bailor other things, and the things thus appropriated become the property of the bailor (*b*).

(2) As an illustration of this explanation may be cited the case of a vendor of goods, who retains his possession, but by appropriate acts evinces his intention to hold them for the purchaser or the purchaser's sub-vendee; the character of his possession being changed, he becomes bailee for the purchaser, who becomes bailor. See note to Section 90.

One highly important class of bailments, that of bailments to carriers, is provided for by special enactments, Act III of 1865 and Act XVIII of 1854, amended by Acts XIII of 1870 and XXV of 1871. So far, however, as the provisions of those Acts do not apply, the law of carriers will be governed by the present Chapter.]

149. The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf.

Delivery to bailee how made.

[See Section 90, Illustrations and notes.]

150. The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them,

Bailor's duty to disclose faults in goods bailed.

(*a*) *South Australian Insurance Company v. Randell*, L. R., 3 P. C., 101.

(*b*) *Vulliamy v. Noble*, 3 Mer., 593, at p. 616.

or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults (1).

If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed (2).

Illustrations.

(a.) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b.) A hires a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

[(1) The first paragraph of this section provides for two cases in which the bailor is to be responsible for damage arising from faults in the thing bailed, of which he is aware and which he has failed to disclose to the bailee. The bailee is entitled to compensation if the faults are such as materially to interfere with the bailee's use of them and he thereby suffers damage, or if he sustains damage from the extraordinarily dangerous character of the thing bailed. In both cases the damage must be the direct consequence of the faults which the bailor has failed to disclose; but in neither case is it material for whose benefit the bailment was made. The liability of a bailor under such circumstances may be compared to that of the owner of premises who invites a stranger to enter without warning him of an existing danger. Such conduct is considered in the nature of a fraud practised upon the person who suffers by it, and the consequent liability rather belongs to the law of wrongs than to that of contract.

(2) In the case of goods bailed for hire, the bailor's liability arises irrespectively of his knowledge of the defect complained of. According to English law, the bailor's promise with regard to the quality of goods hired is analogous to that of the vendor with respect to goods sold: that is to say, there is no such warranty when there is a simple hiring of specific articles; but

where the thing is ordered and supplied for a specified purpose, for which such things usually are hired, then there is a warranty of its fitness for such purpose (a); see Section 114. Where a person hired a furnished house, it was held that he was entitled to have such furniture as would make the house fit for immediate occupation (b); and so it would be with every case of a party furnishing goods; he would be bound to furnish that which was fit to be used. But a letting of land for pasture has been held not to involve a warranty of its fitness for the intended purpose, so as to justify the lessee in throwing up the land and refusing to pay rent on finding that the pasture is unwholesome for cattle (c).]

151. In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

Care to be taken by bailee.

[This section sweeps away all the distinctions between the degrees of care required of bailees. Whatever is the purpose of the bailment, whether for the benefit of the bailor or bailee, whether it is gratuitous or not, the rule of ordinary prudence is applied. In the English cases the amount of care required is said to vary according to the nature of the bailment. Thus, a gratuitous depositary is said to be liable only for *gross* negligence; a loan is said to impose a liability even for *slight* negligence on the part of the borrower; and in other bailments, *e. g.*, of hire or of pawn, ordinary diligence, or diligence such as a man would have exercised towards his own property, is required. This variety has occasioned an immense amount of discussion upon the limits of the several obligations. The tendency of recent cases has been to simplify the law on this head and to reduce it to something very like what is expressed in this section. In a recent case, where securities deposited in a bank for safe custody had been abstracted by the

(a) *Fowler v. Lock*, L. R., 7 C. P., 272; *ib.*, 9 *ib.*, 751; *ib.*, 10 *ib.*, 90.

(b) *Smith v. Marrable*, 11 M. & W., 5.

(c) *Sutton v. Temple*, 12 M. & W., 52.

easier, the question arose, whether the bankers could be held responsible. Although Lord Chelmsford, in giving judgment, remarks that different degrees of care are demanded in different cases, he lays down the law as to gratuitous bailment in terms which have been equally applied to all other bailments, except perhaps that of loan. "It is clear," he says, "according to the authorities, that the bank in this case were not bound to more than ordinary care of the deposit entrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs" (a). The Court has, in dealing with cases under this section, to determine what a man of ordinary prudence would have done *with his own goods* under the circumstances. It must, therefore, take into consideration the state of society, the general usages of life, and the danger peculiar to the times, as well as the apparent nature of the object of bailment and the degree of care which it seems to require. The fact that the bailee's goods were lost at the same time is not sufficient ground for acquitting him of negligence with regard to the bailor's goods (b). A bailee does not generally warrant the safety of goods placed in his charge, and if he takes proper measures to secure them, he is not responsible because they are damaged by circumstances over which he has no control. In a recent case, where the plaintiff's carriages had been damaged by the fall of a shed in which the defendant, a livery stable-keeper, kept them for him, it was ruled that "all that he [the defendant] was bound to do was to use ordinary care in the keeping of the plaintiff's carriages, and that, if in causing the shed to be built he did all that he did, by employing a builder and otherwise, with such care as an ordinary careful man would use therein, he would be protected, and would be exempt from liability for an event which was caused by the careless or improper conduct of the builder of which the defendant had no notice" (c). On the same principle it has been held that the obligation of the carrier of passengers does not extend so far as to make the carrier responsible for a latent defect which he could not by

(a) *Giblin v. McMullen*, L. R., 2 P. C., at p. 337.

(b) *Doorman v. Jenkins*, 2 A. & E., 256.

(c) *Searle v. Laverick*, L. R., 9 Q. B., at p. 124.

proper care have prevented or detected (a). It may be, however, that the relation of the parties and the character of the bailment shows that they intended the bailee to take upon himself absolute responsibility. Those who offer accommodation for persons or goods may do so under circumstances which show that they intended to warrant the safety and sufficiency of that accommodation. In *Francis v. Cockrell* (b), the defendant caused to be erected a building for viewing a public exhibition, and allowed the plaintiff among other persons to enter upon it on payment of a certain sum. The building had been erected by competent persons, but, being badly constructed, fell and injured the plaintiff. The defendant was ignorant of the imperfect construction and was guilty of no negligence, yet the Court held him responsible, thinking that the contract between him and the plaintiff did contain an implied warranty that due care had been used in the construction of the building by those whom the defendant had employed to do the work as well as by himself. If an unexpected or uncommon event arises, the bailee must make efforts proportionate to the emergency (c). If the commodity is perishable and require special care for its preservation, he must bestow such care upon it, or he will be responsible for any damage (d). If he is not aware of the contents of a box, and they are more valuable than the appearance would have led him to suppose, his care need only be proportioned to the apparent value (e).]

152. The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in Section 151.

[The owner of goods does not, by depositing them with a bailee, throw upon him absolutely the risk of their loss or destruction; the bailee is excused from his obligation to return them

(a) *Readhead v. Midland Railway*, L. R., 4 Q. B., 379.

(b) L. R., 5 Q. B., 184, 501.

(c) *Leck v. Maestaer*, 1 Camp., 138.

(d) Add. on Cont., 6th edn., 417.

(e) *Ibid*, 405.

according to the bailor's directions if they have been destroyed by some accident against which he was not bound to guard them.]

153. A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

Termination of bailment by bailee's act inconsistent with conditions.

Illustration.

A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.

[This and the following section are for the protection of the bailor whose goods are being used by the bailee in a manner inconsistent with the conditions of the bailment. The bailor may, under such circumstances, determine the bailment, although it has been created for a specified purpose which has not been accomplished, or for a definite term which has not expired. According to English law, if a hirer of goods sells them, his interest is determined, and the owner may recover them against a *bonâ fide* purchaser (a). So it was held by the High Court of Bengal in a case turning on the construction of Section 108, Exception 1, that a hirer of goods could not sell them and convey a good title to the purchaser; see note to Section 108 (b).]

154. If the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

Liability of bailee making unauthorized use of goods bailed.

Illustrations.

(a.) A lends a horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the

(a) 2 Wm.'s Saund., 47c, n. (f).

(b) Greenwood v. Holquette, 12 B. L. R., 42.

horse accidentally falls and is injured. B is liable to make compensation to A for the injury done to the horse.

(b.) A hires a horse in Calcutta from B expressly to march to Benares. A rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A is liable to make compensation to B for the injury to the horse.

[This section imposes on the bailee an absolute liability for damage arising to goods during his use of them in a manner inconsistent with the conditions of the bailment. It is immaterial, therefore, that the damage is not the direct or immediate result of the deviation from the conditions. The liability to make compensation arises whatever be the nature of the bailment, whether for the benefit of the bailor or bailee, whether paid or gratuitous.]

155. If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

Effect of mixture, with bailor's consent, of his goods with goods of bailee.

[This and the two following sections provide rules for three different sets of circumstances under which the bailor's goods may become mixed or confused with those of the bailee. Where the two parties consent to the mixture, the rule is similar to that laid down by Blackstone, namely, "that the proprietors have an interest in common in proportion to their respective shares" (a).

The same rule is also to be found in the Civil law, under which system it is also applicable to cases (b) where the materials are mixed accidentally and without the intention of either party.]

156. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties

Effect of mixture, without bailor's consent, when the goods can be separated.

(a) 2 Black. Comm., 405.

(b) Just. Inst., lib. II, tit. I, 27 and 28.

respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Illustration.

A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark. A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

[The second case is where the mixture takes place without the bailor's consent, and the goods so mixed can be separated. The rule then is that the two parties retain their separate interests in their respective goods, and that the bailor is entitled to have a separation made at the bailee's expense, and to be compensated by him for any damage. Here again the rule of Civil law is followed.]

157. If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods, and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Effect of mixture, without bailor's consent, when the goods cannot be separated.

Illustration.

A bails a barrel of Cape flour worth Rs. 45 to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. B must compensate A for the loss of his flour.

[The third case is, where the bailee, without the consent of the bailor, mixes goods bailed to him with goods of his own, and the nature of the goods makes separation impossible. The bailor is then at liberty to abandon his ownership in his goods and to claim compensation to the extent of their whole value. If, subsequently to the mixing of the goods, the owner adopted the bailee's act, he would be entitled to claim an interest in the mixture according to his share. See Section 196. Under this and the two preceding sections, two questions only are of importance, namely, was there consent

on the bailor's part to the mixture of the goods, and are the goods separable? This section seems to adopt a rule distinct as well from that of the Civil law as of the English Common law. According to the Civil law, the aggregate resulting from an unauthorized mixture of two things by the owner of one belonged to the other owner who had not interfered in the mixture, but he was bound to allow the other compensation for his loss (a). According to the Common law the mixture belongs to the same person, but he is not bound to make any compensation. "What are the cases," says Lord Eldon (b), "in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but, if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them the other party cannot tell what was the original value of his property, he must have the whole; and the principle goes to the full extent of what is now contended." Accordingly, it was held that an agent, having confounded his principal's property with his own, should be charged with the whole, except what he could prove to be his own.]

158. Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

[As the bailment referred to in the section is purely for the bailor's convenience and benefit, it is obviously just that he should reimburse the bailee for any outlay necessary for the purpose contemplated. The same obligation is also imposed by Section 70, inasmuch as it is a case where a person enjoys the benefit of something done for him by another under circumstances showing that the act was not intended to be gratuitous. If the expenses were reasonably incurred, it will make no difference if

(a) 2 Black. Comm., 404.

(b) Lupton v. White, 15 Ves., 432, at p. 441.

the bailor has not derived the expected benefit from them (a). By the Civil law the borrower, where the loan was for his own benefit, was entitled to be compensated for extraordinary expenses incurred in the preservation of the thing bailed, but not for ordinary expenses incidental to its enjoyment. This section has the effect of throwing the burden of necessary expenses upon the bailee in all cases where the bailment is not exclusively for the bailor's benefit.]

159. The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

[The Common law does not seem to recognize any distinctions between different kinds of loans, but regards them all as resting simply on the good pleasure of the lender and, therefore, strictly precarious (b). There appears to be no authority showing that a lender can be made liable for damages when he has exercised his power of terminating the bailment. The result of the compensation provided in the section will, of course, be to place the borrower in his original position, just as if he had never accepted the loan.]

160. It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the

Return of
goods bailed, on
expiration of
time or accom-
plishment of
purpose.

(a) St. on Bailments, § 197.

(b) St. on Bailments, § 258.

purpose for which they were bailed has been accomplished.

[This section must be construed subject to the provisos contained in Sections 152 and 170. The bailee's promise to return the goods is conditional upon their continued existence, and the performance of this promise cannot be enforced if the bailee has a lien upon them.

By Act IX of 1871, as also by Act XV of 1877, a suit against a depositary or pawnee of moveable property must be brought within thirty years of the date of the deposit or pawn, unless where an acknowledgment of the title of the depositor or pawnor, or of his right of redemption, has, before the expiration of the prescribed period, been made and signed by the depositary or pawnee, or some person claiming under him, in which case the period will be calculated from the date of the acknowledgment. This, however, must be taken subject to the provision contained in Section 10, that no suit against a person in whom property has become vested in trust for any specific purpose, or against his representatives, for the purpose of following in his or their hands such property, shall be barred by any length of time. The same is the principle of English law. Thus, where plate was deposited with the defendant upon a trust for safe custody, and he sold it without the knowledge of the owners, it was held that, though more than the statutory time had elapsed since the sale, the owners were, nevertheless, entitled to regard the cause of action as arising upon the bailee's refusal to deliver on request (a).]

161. If, by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

Bailee's responsibility when goods are not duly delivered or tendered.

[The responsibility which the bailee incurs by failing to discharge the duty imposed by the last preceding section is similar to that which a bailee incurs who uses the goods in

(a) *Wilkinson v. Verity*, L. R., 6 C. P., 206.

an unauthorized manner ; he becomes liable for all loss, destruction or deterioration, from whatever source, which occurs subsequent to his breach of duty.]

Termination of gratuitous bailment by death.

162. A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

[In the case of a gratuitous bailment, the relationship between the parties being presumably for the bailee's benefit and grounded on the bailor's confidence in him, it follows that the death of either party should bring it to a close. It does not appear that in such case the bailee would be entitled to the indemnification provided in the case of gratuitous bailments by Section 159.]

163. In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Bailor entitled to increase or profit from goods bailed.

Illustration.

A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

[When the bailor exercises his right of reclaiming possession of the thing bailed, it is the duty of the bailee to restore it with all its accretions, and in such a condition as is consistent with its ordinary use according to the nature of the bailment. As the bailor bears the risk of the loss, destruction or deterioration of the thing bailed arising from inevitable accident, he is entitled to the profits which have accrued from it (a).]

164. The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.

Bailor's responsibility to bailee.

(a) St. on Bailments, § 260.

[The duty and liabilities of the bailee having been set forth in the preceding sections, this and the three following sections provide for his security. In the first place, there is a risk that the bailor may have been dealing with the goods without any right to do so. The present section, accordingly, provides, virtually, that the bailor shall warrant his title to the goods bailed, and gives the bailee an indemnity from the bailor against any loss or damage which may be caused by the bailor's want of title. It may thus be compared with Section 109. A similar warranty of title in favour of the hirer of goods is implied in the English law.]

165. If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Bailment by
several joint
owners.

[Another difficulty to which a bailee is likely to be exposed is that, where several persons jointly bail goods, one of them may subsequently give directions about them, and the bailee may be in doubt as to whether he is to obey such directions without the concurrence of the other bailors. The present section sanctions his doing so, where there is no agreement to the contrary. According to the English rule, if a bailment is made by several joint owners, one of them has no right to demand back the goods: but if one of several joint owners, being in possession of the goods, bails them, he can demand them back without the concurrence of the other co-owners (a).]

166. If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

Bailee not responsible on re-delivery to bailor without title.

(a) *Broadbent v. Ledward*, 11 A. & E., 211.

[Section 164 has already provided the bailee with a remedy against the bailor for any loss arising from the bailor's want of title. The present section gives the bailee another security, by protecting him from suit at the hands of the owner of the goods in case he has, in good faith, re-delivered the goods to the bailor. Although Section 117 of the Evidence Act precludes a bailee from denying that his bailor had, at the commencement of the bailment, authority to make it, yet Exception (2) enables the bailee to set up the title of a third person, to whom he has delivered the goods, as a defence to a suit by the bailor. The bailee has no better title than the bailor, and, consequently, if a third person, entitled as against the bailor to the property, claim it, the bailee has no defence against him (a). The estoppel ceases and the bailee is entitled to set up *jus tertii* when the bailment is determined by what is equivalent to an eviction by title paramount. It is not enough that he has become aware of the title of a third person, or that an adverse claim has been made upon him (b). The defence of a bailee as against the bailor must in fact amount to this, *viz.*, that the bailor's title was defeasible, that it has been defeated by a third person, and that the bailee is defending upon the right and authority of such third person (c). Under the English system, a bailee to the goods in whose hands rival claims are made may interplead. See note to Section 167.

A holder of goods may, by his own representation, constitute himself bailee for another, and thus becomes estopped from denying his title. Thus, where a bailee, by attorning to the purchaser of goods, in effect represented to him that the property had passed to him (though such was not the fact), and thereby induced him to alter his position and pay the price to the vendor, the bailee was held estopped from setting up the title of a third person as against the person to whom he had thus attorned (d).

So, again, where defendant sold a certain quantity of barley to

(a) *Batut v. Hartley*, L. R., 7 Q. B., 594.

(b) *Biddle v. Bond*, 6 B. & S., 225

(c) *Thorne v. Tilbury*, 3 H. & N., 534.

(d) *Hawes v. Watson*, 2 B. & C., 540.

M, no specific portion being appropriated to the contract and the price being unpaid, and M sold the same quantity to plaintiff who paid the price and received a delivery-order, the defendant, having promised to deliver in accordance with the order, was held to be estopped from denying that the property had passed to M, and that he himself held as bailee for plaintiff (a).]

167. If a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

Right of third person claiming goods bailed.

[It is to be observed that the proceedings under the present section must be initiated by the party claiming the goods, not by the bailee. It is, however, open to the bailee, threatened by opposing claims, himself to institute a suit under Chapter XXXIII of the Civil Procedure Code, 1877. The conditions therein prescribed, under which a suit of interpleader may be instituted, seem to be the same generally as those under which interpleader would lie in the English Courts. Whether the interpleader be at law or in equity, it is essential that the person seeking to enforce it should be in a condition of complete neutrality between the rival claimants; for if any questions exist between the bailee and one of the claimants, arising out of his representation or his relation to either of them, then that claimant ought not to be deprived of adjudication upon those questions and, consequently, cannot be compelled to interplead (b).]

168. The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and where the owner has offered a specific reward for the return

Right of finder of goods.

May sue for specific reward offered.

(a) *Knights v. Wiffen*, L. R., 5 Q. B., 660.

(b) *Kerr on Injunctions* (1867), 123; *Crawshaw v. Thornton*, 2 My. & Cr., 1.

of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

[The right of lien conferred by this section on the finder of goods who has incurred expense with regard to them does not exist in the English law. It appears to follow from the obligation imposed by Section 70 on the person enjoying the benefit of a thing lawfully done for him by another person, to compensate that person. The finder has the right of retaining the goods, but he has no right to sue for the expenses which he has incurred, because, till the owner is again in possession of his goods, he has not enjoyed the benefit of the finder's act, and so, under Section 70, is under no obligation to him. Where, however, there has been a reward offered for the discovery of goods lost, there is a complete contract with the finder, and he is accordingly entitled to sue for the reward and to retain the goods until he receives it.]

169. When a thing which is commonly the subject of sale, is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

When finder of thing commonly on sale may sell it.

(1) when the thing is in danger of perishing or of losing the greater part of its value, or,

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

[In the case of a finder of goods, the English law requires the least degree of care, and makes him liable for nothing short of gross negligence in keeping them (a). It appears, however, to be his duty to take steps for discovering the rightful owner, and if he fail to take such steps, or, knowing the owner, retains the goods without any intention to restore them, he is guilty of

(a) St. on Bailments, § 87.

theft (a). Under the Indian Penal Code a person who finds property and takes it with an honest intention, and subsequently misappropriates it, when he knows or might know the owner, is guilty of criminal misappropriation; Section 403, Exp. 2, ill. (d).

As against all but the rightful owner the finder of goods has an enforceable title (b).

This section gives the finder the right of selling where the perishable nature of the goods requires it, or when his charges with regard to it amount to two-thirds of their value; but this right must not be exercised until he has failed in his efforts to find the owner, in which efforts he must use reasonable diligence; or unless the owner refuses to pay the charges in respect of which the finder's lien exists.]

170. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations.

(a.) A delivers a rough diamond to B, a jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.

(b.) A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months' credit for the price. B is not entitled to retain the coat until he is paid.

[The right of lien conferred by this section pre-supposes the existence of a contract between the bailor and the bailee, the promise on the bailee's part being to bestow services involving labor or skill upon the goods bailed, that on the part of the

(a) 2 Russell on Crimes, 4th edn., p. 169.

(b) *Armory v. Delamirie*, 1 Str., 504; 1 Sm. L. C., 6th edn., 313.

bailor to remunerate the other for the performance of those services. The right cannot be exercised unless the services have been performed and the remuneration is due. It does not extend to other claims which the bailee may have against the bailor, unless the character of the bailment brings the case within Section 171. He cannot, therefore, retain goods in respect of which he has incurred necessary expenses of which reimbursement is due to him (a) (Section 158). Still less can he retain goods bailed to him for one purpose as security for claims arising out of some distinct matter. Thus, a borrower of an article cannot keep it by way of security for an antecedent debt (b). A bailment for mere custody would not confer a lien, because no labor or skill is expended upon the thing so bailed. For this reason it has been held in England that a person who receives cattle to graze is not entitled to a lien for the stipulated price of the grazing (c).

This lien may be determined in the same manner as that of the unpaid vendor, that is to say, by satisfaction of the debt, by abandonment of possession of the thing bailed, or by the making of a contract which is inconsistent with its existence. According to English law a wrongful parting with the goods on the part of the bailee gives the owner immediate right of possession, which he may enforce against the purchaser from the bailee (d). But see note to Section 153.]

171. Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other persons have a right to retain, as a security for such balance, goods

General lien of
bankers, factors,
wharfingers, at-
torneys and po-
licy-brokers.

(a) Ad. Con., 6th edn., p. 422; *Turner v. Ford*, 15 M. & W., 212.

(b) St. on Bailments, § 264.

(c) *Jackson v. Cummins*, 5 M. & W., 342; *Judson v. Etheridge*, 1 Cr. & Mee., 743.

(d) 2 Wm.'s Saund., 47b, note.

bailed to them, unless there is an express contract to that effect.

[A general lien does not, according to English law, exist simply because the person claiming it fills a certain character. He must also have received the goods, and done the act, in respect of which the debt becomes payable, in the particular character to which the general lien attaches (*a*). Things may be delivered for a specific purpose in a mode which is inconsistent with a general lien. Thus, it was held that bankers had no such lien on exchequer-bills delivered to them for the purpose of receiving the interest and exchanging them for new ones (*b*). Nor have they a general lien upon securities deposited with them to secure a specific sum (*c*). The fact, however, that separate accounts are kept at a bank will not prevent the banker's general lien from attaching. Thus, "the O. Bank kept three accounts at the A. Bank, namely, a loan-account, a discount-account, and a general account. They from time to time received advances from the A. Bank, which were entered in the loan-account, and to meet which they deposited securities with the A. Bank. In the course of the transactions, the O. Bank deposited three bills of exchange with the A. Bank, accompanied by a letter stating that they proposed to draw upon the A. Bank for £10,500, but that, as their credit would not afford a margin to that extent, they sent these bills as a collateral security. The O. Bank became insolvent and was wound up. It was held that there was nothing in the course of dealing or in the terms of the letter to exclude the general rule that a banker has a lien on the securities deposited by a customer for the customer's general balance, and that, the balance of the loan-account being satisfied, the A. Bank might retain the bills for the balance of the general account" (*d*).

Attorneys have a lien for their general balance on all papers of their clients which come into their hands in the course of their

(*a*) *Dixon v. Stansfeld*, 10 C. B., 398, at p. 418.

(*b*) *Brandao v. Barnett*, 3 C. B., 519.

(*c*) *Vanderzee v. Willis*, 3 Bro. Ch. Ca., 21.

(*d*) *La re European Bank, L. R.*, 8 Ch. Ap., 41.

professional employment as attorneys (a). A solicitor who has been discharged by his client may set up his lien for costs upon papers necessary to enable his client to proceed with his case, and will not be ordered to deliver up or produce them. Such a lien is a general one, and extends to all costs due from the client to the solicitor. A solicitor who discharges himself has not this right under English law (b). It is not, however, clear, from the wording of the present section, that an attorney who had discharged himself would not have this right. As to the right of agents to reimburse themselves out of money coming into their hands, and to retain goods, papers, &c., see further, Sections 217 and 221. A policy-broker may retain the policy as against his employers, although they are merely agents for third persons. See Section 221.]

BAILMENTS OF PLEDGES.

172. The bailment of goods as security for payment of a debt or performance of a promise is called 'pledge.' The bailor is in this case called the 'pawnor.' The bailee is called the 'pawnee.'

'Pledge,' 'pawnor,' and 'pawnee' defined.

["There are three kinds of security," observed Willes, J. : "the first, a simple lien ; the second, a mortgage, passing the property out and out ; the third, a security intermediate between a lien and a mortgage—*viz.*, a pledge—where by contract a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt" (c).]

The position of pawn-brokers is defined in England by 39 & 40 Geo. III, c. 99. Beyond the present and the following sections there is no statutory law on the subject in this country.]

173. The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but

Pawnee's right of retainer.

(a) *Stevenson v. Blakelock*, 1 M. & S., 535.

(b) *In re Faithfull*, L. R., 6 Eq., 325.

(c) *Halliday v. Holgate*, L. R., 3 Ex., at p. 302. For other definitions of pledge, see *Donald v. Suckling*, L. R. 1 Q. B., at p. 694.

for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

[The pawnee may retain the goods pledged for the payment, as well of the debt and everything which could be recovered in a suit for the debt, as of all expenses, whether ordinary or extraordinary, which have been necessarily incurred in respect of the goods pledged. This rule, as far as it affects ordinary expenses, does not seem to be warranted by English cases (a). See note to Section 160.]

174. The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Pawnee not to retain for debt or promise other than that for which goods pledged.

Presumption in case of subsequent advances.

[In other words, the pledge does not give the pawnee a general lien. In determining, therefore, whether the pawnee has a right to retain a thing pledged, the question will be, whether there is any evidence of intention to appropriate the security to the debt in respect of which the creditor seeks to retain it. No such inference can be drawn from the fact that a former debt was due to the pledgee, and therefore, when the pledge is made for a subsequent debt, he is not entitled to retain it for the former one. On the other hand, if the pledgee makes advances subsequently to that for which the pledge was originally given, it may well be assumed that the parties intended the pledge to subsist for such advances as well as for the original debt (b). The right so given is called the right of tacking, and a similar, though

(a) St. on Bailments, § 357.

(b) *Ibid.*, § 304.

less extensive, right belongs to the pledgee of immoveable property (a).]

175. The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

Pawnee's right as to extraordinary expenses incurred.

176. If the pawnor makes default in payment of the debt, or performance, at the stipulated time, of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security ; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

Pawnee's right where pawnor makes default.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

[The pawnee's right to retain the pledge as long as the debt thereby secured remains unpaid is not affected by his sub-pledging to another person. Thus, where A deposited debentures with B as a security for the payment, at maturity, of a bill endorsed by A and discounted by B, and, before the maturity of the bill, B pledged the debentures with C for a debt exceeding the amount of the bill ; it was held that A, not having paid the bill at its maturity, was not entitled to maintain detinue against C (b).

The pawnee's power of sale upon the pawnor's default is analogous to the power of re-sale given to the vendor by Section 107, and must be exercised in a similar way ; but the pawnee

(a) *Adams v. Claxton*, 6 Ves., 229 ; *Praed v. Gardiner*, 2 Cox, 86.

(b) *Donald v. Suckling*, L. R., 1 Q. B., 585.

must account to the pawnor for the proceeds and must not retain more than the amount of his debt. The security of the goods pledged is merely collateral, and the debt, therefore, is not extinguished by the fact of a sale having taken place, if the proceeds of the sale fall short of the amount of the debt. The section appears to assume that there will be in each case a stipulated time for payment, as no provision is made for sale in cases in which no such time is fixed.]

177. If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

Defaulting
pawnor's right
to redeem.

[A suit can be brought against a pawnee of moveable property within thirty years from the pawn or an acknowledgment of it signed by the pawnee, Act XV of 1877, Sched. 2, Art. 145. So long as the pawnor's claim is not barred by the provisions of this Act, he can redeem the pledge, although the stipulated time for payment has expired. According to the English cases, he must discharge the debt before he can entitle himself to possession even against a pawnee who has wrongfully sold, and he has no right of action against a pawnee under such circumstances, unless he has first discharged the debt (a). Under the present Act the pawnee's rights are defined by Section 176, and it would appear that a pawnor might sue the pawnee for any proceeding not warranted by that section, although the goods were still unredeemed.]

178. A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order

Pledge by possessor of goods or of documentary title to goods.

(a) *Halliday v. Holgate*, L. R., 3 Ex., 299.

for delivery, or any other document of title to goods, may make a valid pledge of such goods, or documents: Provided that the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly :

Provided also that such goods or documents have not been obtained from their lawful owner, or from any person in lawful custody of them, by means of an offence or fraud.

[The same remarks apply to this section as have been made on Exception 1, Section 108. Here, moreover, the words "by the consent of the owner" and "notwithstanding any instructions of the owner to the contrary" are wanting. Whereas the English Statute only protects the pledgee's right over the goods when he has made a *present advance* upon them to one whose authority to hold the goods exists *unrevoked* (a), and when, although the pledgee may know that he is dealing with an agent, he has no notice that the pledgor has not authority to make the pledge or is acting *malâ fide* in doing so ; this section, on the other hand, gives the mere holder of goods, or the symbols of them, power to make a valid pledge, so long as his possession of them has not been obtained by means of an offence or fraud, and so long as the pawnee acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly. The Act dispenses with the necessity of an actual existing authority, vested in the pledgor, to hold the goods, and, apparently, does not require that a present advance should be made. The pledgee's conduct in the transaction must, however, show the same good faith on his part as is required under the English Act. The question in such a case would be, whether the circumstances were such that a reasonable man of business, applying his understanding to them, would certainly know that the agent had not authority to make the pledge, even if

(a) *Fuentes v. Montis*, L. R., 3 C. P., 268 ; *ib.*, 4 *ib.*, 93.

the agent was not also acting *malâ fide* in respect thereof towards his principals. If that question is answered in the affirmative, the pledge is invalidated (a).]

179. Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

Pledge where
pledgor has only
a limited inter-
est.

[This section is at first sight inconsistent with Section 178, and must be taken to apply to such cases only as do not fall within its scope, as, for instance, where the limited nature of the pledgor's interest is known to the pledgee. It has been held that, where one of several joint owners has pledged goods, another of the joint owners is not entitled, acting alone, to redeem them, and cannot, therefore, maintain an action against the pledgee for wrongfully selling them (b). It is not clear how, according to the Act, such a case would be dealt with, nor how, in effect, the pledgee's right is to be limited to the extent of the interest of the co-owner from whom he accepts the pledge. If the interest of the pledgor is limited in time, the pledgee must, on the expiration of that interest, surrender possession to the party who has succeeded to the legal ownership. Therefore, where a widow pawned plate, settled upon her for life, and then died, it was held that the pawnee had no right to retain it against the remainderman, although the pawnee had no notice of the widow's limited interest (c).

It is to be observed that the protection expressly afforded to the *bonâ fide* purchaser from one of several joint owners is not extended to *bonâ fide* pledgees of goods pledged by one of several joint owners; for the 2nd Exception to Section 108 makes a sale by one of several joint owners valid, provided the consent of the other owners to his sole possession, the good faith of the purchaser, and the absence of circumstances

(a) *Gobind Chunder Sein v Ryan*, 9 M. I. A., 140; see also *Kartick Churn Setty v. Gopalkisto Paulit*, I. L. R., 3 Cal., 264.

(b) *Harper v. Godsell*, L. R., 5 Q. B., 422.

(c) *Hoare v. Parker*, 2 T. R., 376.

to indicate that the sale is unauthorized, are shown to exist. No corresponding section is enacted with regard to pledge.]

SUITS BY BAILEES OR BAILORS AGAINST WRONGDOERS.

Suit by bailor or bailee against wrongdoer. 180. If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

[A bailee, whatever may be his legal right to possession, may bring an action against a wrongdoer who disturbs him in his actual possession, or does any injury to the goods. Except against the rightful owner, a bailee, even though he be only a casual finder of the goods, may exercise all the remedies of an owner, so far as is necessary for securing possession of the goods and obtaining compensation for injury done to them. With regard to compensation, Section 181 provides that whatever is received by the bailee, if he be the party who sues, shall be shared by the bailor and bailee according to their respective interests. This provision is necessary because the present section gives the bailee a right of action for the whole damage done to the goods, and this damage may easily extend beyond the bailee's temporary interest. The bailor, therefore, is entitled to receive so much of the compensation recovered as is applicable to his interest. If the suit be brought by him, he is, in like manner, bound to share the proceeds with the bailee according to their respective interests. The present section invests the bailee with greater rights than he has under English law: for it apparently goes the length of putting him, so far as regards the right of action in respect of the goods, completely in the place of the sole owner. The English cases make mere possession sufficient foundation for action against a wrongdoer; and there is authority for the propo-

sition that a bailee may maintain an action for any wrong done to the thing bailed, for which he is himself responsible (a). But there are other cases in which the rule given in the section does not hold good.]

181. Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

Apportionment
of relief or com-
pensation ob-
tained by such
suits.

CHAPTER X.

AGENCY.

APPOINTMENT AND AUTHORITY OF AGENTS.

182. An 'agent' is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the 'principal.'

'Agent' and
'principal' de-
fined.

[In *Bhoobun Chunder Sen v. Ram Soonder Surma Mozoomdar* (b), it was held (*per* Mitter, J.) that where a person undertook to make an application to the Collector on behalf of all the co-sharers in a certain mehal, under Section 6 of Act XI of 1859, he became "an agent" for that special purpose within the meaning of this section, and the fact of there being no consideration for the undertaking would not take from him the character of an "agent," see Section 185.]

183. Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

Who may em-
ploy agent.

(a) *Rooth v. Wilson*, 1 B. & Ald., 59.

(b) *I. L. B.*, 3 Cal., 300.

[This section may be compared with the 11th, from which it differs only in the omission of the requirement that the person should not be "disqualified from contracting by any law to which he is subject." It would seem, therefore, that a person may employ an agent, although he is himself disqualified from contracting. As, however, the agent is to act for the principal and to represent him in dealings with third persons, the agent's powers would be restricted to those of his principal.

Such acts, whether done by an infant or by his authorized agent, are not void according to English law, but merely voidable.]

184. As between the principal and third persons,
 Who may be any person may become an agent ;
 an agent. but no person who is not of the age of
 majority and of sound mind can become an agent,
 so as to be responsible to his principal according to
 the provisions in that behalf herein contained.

[The rule laid down in this section is illustrated in English law by the common case of a wife ordering household necessities on her husband's behalf. He becomes liable just as if he had personally promised to pay, but she can incur no responsibility to him.]

Consideration
 not necessary. 185. No consideration is necessary
 to create an agency.

[The duties which an agent is bound to perform become obligatory upon him by virtue of his mere acceptance of the employment. The gratuitous agent is bound to protect his principal's interests in the same manner and on the same principle that a gratuitous bailee is bound to take care of the thing bailed to him for safe custody. The permission to act in the one case, and the delivery of the thing in the other, are regarded in English law as considerations moving from the principal and the bailor respectively. "A gratuitous agent is not bound to undertake the agency, but having undertaken it, he is liable for any loss sustained by his principal through his gross negli-

gence: what constitutes gross negligence is a question on the facts of each particular case" (a).

Agency is not a contract for which any express consideration on either side is necessary, because the fact of employment and the credit thereby gained on the one hand, and the promise to act on the other, are of themselves sufficient to constitute a good contract. In other respects it resembles other contracts, and the parties to it must, therefore, be of age, of sound mind, and competent to contract. The employment also gives rise to another contract, which, indeed, is generally the ultimate object of the employment, *viz.*, that effected through the agent between his principal and a third party. This contract may be completed through the agency of one who is not himself competent to contract; and, therefore, although there is no valid contract between the principal and the agent, there may be one between the principal and a third party.]

Agent's authority may be expressed or implied.

186. The authority of an agent may be expressed or implied.

[In some cases the appointment of an agent must be expressly made. A vakalatnamah appointing a pleader must, under Section 39 of Act X of 1877, be in writing, and it must also be revoked in writing. So also agents for the purpose of registration; see Registration Act (III of 1877), Section 32.

According to English law, an agent who is deputed to execute a deed must himself be appointed by deed.]

187. An authority is said to be express when it is given by words spoken or written.

Definitions of express and implied authority.

An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Illustration.

A owns a shop in Serampore, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in

(a) *Agnew v. Indian Carrying Co.*, 2 M. H. C., 449.

the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop.

[A distinction is made in the books between general and particular agents: the former class including brokers, factors and all persons employed in recognized business; the latter denoting agents who have no apparent authority, but are appointed for some single particular purpose, and the extent of whose authority is defined precisely by the terms of their appointment. See note to Section 237.

A person dealing with an agent of the latter description is bound to discover the limits of his authority, and cannot charge the principal with a contract made in excess of it. Thus, if an ordinary servant is commissioned by his master to sell his horse at a certain price, and sells it below that sum, or gives a warranty with it, not being authorized so to do, the master may repudiate the sale in the one case, and is not bound by the warranty in the other (*a*). On the other hand, if the agent fills some recognized character and is employed in a particular trade or business, his authority is generally regulated by the usages of such business (*b*).

In *Chuckerbutty v. Cockrane* (*c*), a Calcutta case which was appealed to the Privy Council, it was held that recourse must be had to the general mercantile law of England in order to determine the extent of an agent's authority. A broker is authorized to deal according to the rules and customs of the market or exchange on which he is employed; and his principal is bound by his acts, although he may have been ignorant of such rules (*d*). Similarly he is restricted by such usages, so he cannot sell on credit, if it is unusual so to do (*e*). See Section 211. And, generally, an authority to receive payment does not authorize receiving payment in anything but money (*f*). "General authorities

(*a*) MS. case cited in *Whitehead v. Tuckett*, 15 East, at p. 407; *Brady v. Tod*, 30 L. J., C. P., 223.

(*b*) *Howard v. Sheward*, L. R., 2 C. P., 148; *Sweeting v. Pearce*, 29 L. J., C. P., 265.

(*c*) 10 M. I. A., 229, at p. 243.

(*d*) *Taylor v. Stray*, 2 C. B., N. S., 175; *Sutton v. Tatham*, 10 A. & E., 27.

(*e*) *Wiltshire v. Sims*, 1 Camp., 258.

(*f*) *Catterall v. Hindle*, L. R., 1 C. P., 186; *Bridges v. Garrett*, L. R., 4 C. P., 580; *Williams v. Evans*, L. R., 1, Q. B., 352.

to transact business, and to receive and discharge debts, do not confer upon an agent the power of accepting or indorsing bills, so as to charge his principal" (a). It was stated by Blackburn, J., in a recent case (b) to be an usage of trade in England so obvious and so well-known as to justify its being treated as a matter of law, that, in the absence of express authority, a commission-agent cannot pledge his foreign constituent's credit. The alleged custom must be consistent with the character in which the agent is employed. "If a person employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts and do not change their intrinsic character." But a custom which has the effect of changing the character of a broker, who is an agent to buy for his employer, into that of a principal, to sell to him, and thereby give him an interest opposed to his duty, is so completely at variance with the relation between the parties, that "no person who is ignorant of such an usage can be held to have agreed to submit to its conditions merely by employing the services of a broker, to whom the usage is known, to perform the ordinary duties belonging to such employment" (c).]

188. An agent, having an authority to do an act, has authority to do every lawful thing which is necessary in order to do such act.

Extent of agent's authority.

An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business.

Illustrations.

(a.) A is employed by B, residing in London, to recover at Bombay a debt due to B. A may adopt any legal process necessary for the

(a) Byles on Bills, 9th edn., p. 32.

(b) *Armstrong v. Stokes*, L. R., 7 Q. B., at p. 605. See also *Elbinger Actien-Gesellschaft v. Claye*, L. R., 8 Q. B., at p. 317.

(c) *Robinson v. Mollett*, L. R., 7 H. L., at pp. 836, 838.

purpose of recovering the debt, and may give a valid discharge for the same.

(b.) A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business.

[Whether the agent's authority be expressly or impliedly conferred, whether it be general or particular, it obviously must include all powers necessary to effectuate the purpose for which it was created. Thus, an authority to deal in a certain market implies an authority to deal according to the usages of that market. The employment of an attorney confers upon him a power to bind his client in all matters necessary for the prosecution of the business. In *Swinfen v. Swinfen* (a), the Master of the Rolls laid down that an attorney could not bind his client by a compromise to which the client did not assent. This view has not, however, been approved in the Common Law Courts, and it is now settled law that an attorney has power, before judgment, to compromise a suit. In *Fray v. Voules* (b) it was held that, as between attorney and client, an attorney had no right to compromise a suit against express instructions: but Lord Campbell intimated that such a compromise would, notwithstanding the client's directions, be binding as between the parties. This doctrine has been upheld in the Bombay High Court in a case (c), in which Westropp, C. J., reviews all the English authorities. After judgment in his client's favor, an attorney has no implied authority to enter into an agreement on his behalf to postpone execution (d). Where the authority is given in writing, its extent is generally defined by the writing, and no extrinsic evidence is admissible, except where it is necessary to explain the character of the employment or the meaning of terms used with reference to any particular trade. Powers-of-attorney are construed strictly, and a power to receive all money and transact all business for the principal has been held not to authorize the indorsing of bills received in payment (e). For such a purpose a special authority is required, and the widest terms omitting it are

(a) 24 Beav., at p. 557.

(b) 1 E. & E., 839.

(c) *Jagannáthdás Gurdákhádás v. Rámdás Gurdákhádás*, 7 Bomb. H. C., 79.

(d) *Lovegrove v. White*, L. R., 6 C. P., 440.

(e) *Hogg v. Snaith*, 1 Taunt., 347.

insufficient (a). Where, however, the drawing and accepting of bills of exchange is incidental to the carrying on of the business, the principal is liable on bills drawn or accepted by his agent, even although he has acted contrary to instructions (b). As to admissions by agents, see Evidence Act, Section 18, and the Limitation Act (XV of 1877), Section 20; also cases cited in notes to Sections 227 and 228.]

189. An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Agent's authority in an emergency.

Illustrations.

(a.) An agent for sale may have goods repaired if it be necessary.

(b.) A consigns provisions to B at Calcutta, with directions to send them immediately to C, at Cuttack. B may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

[Masters of ships are, by the necessity of their situation, invested with the largest authority over the vessel and cargo which they have under their charge. See Section 214. On the one hand a duty is cast upon them, in many cases of accident and emergency, to act for the safety of the ship or cargo in such manner as may be best under the circumstances in which they may be placed; and on the other hand a correlative right arises to charge the owner with the expenses properly incurred in so doing. Thus, where the master, being unable to deliver a cargo of petroleum at the port of destination, carried it back again to the port of shipment, it was held that, under the circumstances, he was justified in so doing, and was entitled to recover back-freight and expenses (c). This authority, being founded on necessity, does not arise in cases where it is reasonably practicable to communicate

(a) *P. Nesserwanjee Bottlewallah v. Gool Mahomed Sahib*, 7 Mad. H. C., 369, at p. 371.

(b) *Edmunds v. Bushell*, L. R., 1 Q. B., 97.

(c) *Gaudet v. Brown*, L. R., 5 P. C., 134.

with the owner of the ship or cargo. As a general rule, agents employed to conduct a business are not authorized to borrow money and pledge the credit of their principals.

An agent appointed by the directors of a company to manage a mine has been held not to have authority to raise money for the purposes of the mine even in case of pressing necessity. "No such power exists," said Parke, B., "except in the cases alluded to in the argument, of the master of a ship, and of the acceptor of a bill of exchange for the honor of the drawer. The latter derives its existence from the law of merchants; and in the former case the law, which generally provides for ordinary events, and not for cases which are of rare occurrence, considers how likely and frequent are accidents at sea, when it may be necessary, in order to have the vessel repaired, or to provide the means of continuing the voyage, to pledge the credit of her owners; and therefore it is that the law invests the master with power to raise money, and, by an instrument of hypothecation, to pledge the ship itself if necessary" (a). See note to Section 70.]

SUB-AGENTS.

190. An agent cannot lawfully employ another to perform acts which he has expressly
When agent cannot delegate. or impliedly undertaken to perform personally, unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

["One, who has a bare power or authority from another to do an act, must execute it himself, and cannot delegate his authority to another; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or who, if known, might not be selected by him for such a purpose" (b). So a factor or a broker cannot ordinarily delegate his employment; but in most commercial agencies delegation is necessary or usual, and, therefore, authority to delegate would be conferred by Section 187 or 188.]

(a) *Hawtayne v. Bourne*, 7 M. & W., at p. 599.

(b) Story on Agency, § 13.

191. A 'sub-agent' is a person employed by, and acting under the control of, the original agent in the business of the agency.

'Sub-agent' defined.

192. Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal (1).

Representation of principal by sub-agent properly appointed.

The agent is responsible to the principal for the acts of the sub-agent (2).

Agent's responsibility for sub-agent.

The sub-agent is responsible for his acts to the agent, but not to the principal, except in cases of fraud or wilful wrong (3).

Sub-agent's responsibility.

[(1) The distinction between a sub-agent "properly appointed" and an agent appointed by an agent "holding an express or implied authority to name another person under Section 194" is that the sub-agent is not immediately responsible to the principal for his acts, nor under his control. The liability of the principal, however, to third persons would appear to be the same in both cases. The effect of this is to impose on the principal a greater liability than is imposed on him by the English law. The question which arises there is, whether the person whose immediate acts are concerned stands in any relation of contract to the person sought to be made liable: a man is responsible for the acts of his servants whom he selects and controls; but he is not generally responsible for those whom his agent engages on a sub-contract (a). Thus, a person who employs a contractor to build a house for him is not responsible for acts of negligence committed by the contractor's workmen. The owner of a ship

(a) *Daniel v. Metropolitan Ry. Co.*, L. R., 5 H. L., 45.

is not responsible for the acts of a pilot, whom the master is bound to take on board, and cannot select (a). Where, however, *the thing itself* which the agent is employed to do, and not merely something collateral to the thing, gives a cause of action to another, the fact that it is done through a sub-agent between whom and the principal there is no privity of contract does not affect the principal's liability. Thus, where a railway company employed a contractor to build a bridge, and the building obstructed the plaintiff's navigation, it was held that the company were liable (b).

The present section appears to depart from the rule on which these decisions proceed, and to go too far in laying down the principal's responsibility; inasmuch as it renders him liable for the acts of persons who are not selected by himself, with whom he has no privity of contract, and who are not responsible to him, nor under his control.

(2) There being no privity of contract between the principal and the sub-agent, it follows that the latter cannot be directly responsible to the principal, but indirectly he may be made liable, for his duty to the agent is the same as that of the agent to his principal. The extent of that duty is defined in Sections 211 to 219. The agent cannot shift his responsibility by throwing the blame on the misconduct of the sub-agent appointed by himself. Thus, because a sub-agent who is immediately managing the business is guilty of neglect in rendering accounts to his employer, that is no answer when the latter is called upon by his principal, the person ultimately interested, to give accounts of the agency-business (c).

(3) Actions for fraud or wilful wrong may be maintained against a sub-agent, as they may be against any stranger, for such rights of action do not arise out of a relation of contract.

The question of the "proper appointment" of a sub-agent becomes important when the liability of the principal for his acts is the matter to be considered. If the appointment is improper, the provisions of Section 193 apply.]

(a) *The Halley*, L. R., 2 P. C., at p. 201.

(b) *Hole v. Sittingbourne Ry. Company*, 30 L. J., Ex., 81.

(c) *Pearse v. Green*, 1 Jac. & W., at p. 139.

193. Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons ; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

Agent's responsibility for sub-agent appointed without authority.

[This section defines the position of the parties where the sub-agent is not "properly appointed," that is, where he is appointed otherwise than in conformity with Section 190. The acts of the person so appointed do not bind the principal, and the two stand in no relation of contract to one another ; nor is the principal liable to third persons for the other's acts of negligence, because he is not his servant. "The liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist : and no other person than the master of such servant can be liable, on the simple ground, that the servant is the servant of another, and his act the act of another ; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable"(a). Thus, where a butcher, having bought a bullock, employed a driver to drive it home, and the driver employed a boy, through whose negligence the bullock injured the plaintiff's property, the butcher was held not liable (b). In that case the driver might clearly have been made responsible to the plaintiff, because the boy was acting as his servant. Moreover, if any harm had happened to the bullock through the boy's negligence, the driver would have been liable to the butcher.]

(a) *Quarman v. Burnett*, 6 M. & W., at p. 509.

(b) *Milligan v. Wedge*, 12 A. & E., 737.

194. Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Relation between principal and person duly appointed by agent to act in business of agency.

Illustrations.

(a.) A directs B, his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. C is not a sub-agent, but is A's agent for the conduct of the sale.

(b.) A authorizes B, a merchant in Calcutta, to recover the monies due to A from C. & Co. B instructs D, a solicitor, to take legal proceedings against C. & Co. for the recovery of the money. D is not a sub-agent, but is solicitor for A.

[An agent, having authority, express or implied, to name another to act for the principal, has, in fact, power to create a contract between such person and his principal. The relation between them is therefore governed by the ordinary rules of principal and agent. The fact of a master engaging servants through the intervention of his butler does not diminish the master's liability for his servants' acts, for it is only the selection of them that he has delegated to another; the control of them and the power of dismissing them he retains in his own hands.]

195. In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and, if he does this, he is not responsible to the principal for the acts or negligence of the agent so selected.

Agent's duty in naming such person.

Illustrations.

(a.) A instructs B, a merchant, to buy a ship for him. B employs a ship-surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently and the ship turns out to be unseaworthy, and is lost. B is not, but the surveyor is, responsible to A.

(b.) A consigns goods to B, a merchant, for sale. B, in due course, employs an auctioneer in good credit to sell the goods of A, and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B is not responsible to A for the proceeds.

[In other words, an agent does not, in such a case, guarantee the solvency, skill or integrity of the person whom he has selected. An agent who does give such a guarantee is called a "*del credere*" agent.]

RATIFICATION.

196. Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

Right of person as to acts done for him without his authority.

Effect of ratification.

[A subsequent ratification is, under certain conditions, equivalent to a prior authority. The act must have been done on behalf of the person who purports to ratify, therefore there can be no ratification by a person who was not in existence or not ascertained at the time when the act to be ratified was done. Thus, where defendants acted as agents for a company not yet in existence, it was held that no subsequent ratification of their acts by the company could, without the assent of the other party to the transaction, relieve the defendants from liability (a). "It would be like the case of a man who has attained the age of twenty-one being sought to be charged by ratification with a contract made when he was *in ventre de sa mere*, or before" (b).

(a) *Kelner v. Baxter*, L. R., 2 C. P., 174.

(b) *Scott v. Ebury*, L. R., 2 C. P., at p. 267.

Nor, under such circumstances, could the company itself, out of whose funds the money was to be paid, be held liable (*a*). A person may ratify an act of which he was unaware at the time it was done, and the ratification may take place at any time (*b*). Where defendants' agent, without authority, drew promissory notes in their name, and the fact was communicated to defendants, and the unauthorized act ratified by them, it was held that they were liable on the notes as if they were makers (*c*). One consequence of ratification is to relieve the agent from the responsibility to the other party which is imposed upon him by Section 235. An act done in excess of an actual authority can be ratified in the same manner as an act wholly unauthorized (*d*).]

197. Ratification may be expressed or may be implied in the conduct of the person on whose behalf the acts are done.

Ratification may be expressed or implied.

Illustrations.

(*a*.) A, without authority, buys goods for B. Afterwards B sells them to C on his own account; B's conduct implies a ratification of the purchase made for him by A.

(*b*.) A, without B's authority, lends B's money to C. Afterwards B accepts interest on the money from C. B's conduct implies a ratification of the loan.

[The amount of evidence required to prove ratification differs materially according as there does or does not exist any established agency. Mere silence or acquiescence on the principal's part is sufficient, when the act in question has been done in the ordinary course of business by his recognized agent. The fact of a man paying a bill which falsely purports to bear his signature as acceptor is some evidence of an implied authorization to accept; but if there is no course of business between the

(*a*) *Melhado v. Porto Allegre Ry. Co.*, L. R., 9 C. P., 503.

(*b*) *Ancona v. Marks*, 31 L. J., Ex., 163.

(*c*) *P. Nesserwanjee Bottlewallah v. Gool Mahomed Sahib*, 7 Mad. H. C., 369.

(*d*) *Secretary of State v. Kamachee Boyc Sahaba*, 7 M. I. A., 476.

parties, and no evidence of continued authorization, the person whose name is thus used is entitled to repudiate his liability on any other bill bearing the same sort of acceptance (a). Ratification is frequently implied from the fact of the principal's knowingly accepting some benefit from the unauthorized act (b), as in Illustration (b). An illegal act cannot be ratified: therefore, where the defendant's name was forged to a note, and he afterwards, for the forger's protection, signed a memorandum stating that he was responsible for the note bearing his signature, it was held by a majority of the Court that the memorandum could not be treated as a ratification, inasmuch as the act which it professed to ratify was illegal (c).]

Knowledge requisite to valid ratification.

198. No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

[If through the fault of the agent or other circumstance, the principal is not correctly and fully informed as to the transaction which he ratifies, his act of ratification does not bind him. Thus, where an agent has stated to his principal, and the latter has honestly adopted, a contract different from that under which the purchase was actually made, the seller cannot call upon the principal for payment, because the contract sued on, and that ratified, are different contracts (d). The cause of the principal's want of knowledge is immaterial.]

Effect of ratifying unauthorized act forming part of a transaction.

199. A person ratifying any unauthorized act done on his behalf, ratifies the whole of the transaction of which such act formed a part.

[A ratification once made with full knowledge of all the material circumstances is irrevocable, and binds the principal with

(a) *Morris v. Bethell*, L. R., 5 C. P., 47.

(b) See *Mayor of Kidderminster v. Hardwick*, L. R., 9 Ex., 13.

(c) *Brook v. Hook*, L. R., 6 Ex., 89.

(d) *Horsfall v. Fautleroy*, 10 B. & C., 755.

regard to the whole of his agent's transaction. It is, therefore, a general rule that where a ratification is established as to a part, it operates as a confirmation of the entire transaction (a).]

200. An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Ratification of unauthorized act cannot injure third person.

Illustrations.

(a.) A, not being authorized thereto by B, demands, on behalf of B, the delivery of a chattel, the property of B, from C who is in possession of it. This demand cannot be ratified by B, so as to make C liable for damages for his refusal to deliver.

(b.) A holds a lease from B, terminable on three months' notice. C, an unauthorized person, gives notice of termination to A. The notice cannot be ratified by B, so as to be binding on A.

[This rule creates an exception to the doctrine that ratification is equivalent to prior authority. Where two persons stand in such relations to one another, that one of them is entitled to make some demand on the other, and, on his failure to comply with it, to hold him liable in damages, it would be unjust to allow the act of an unauthorized stranger to be equivalent to that of the person who is himself entitled to make the demand; for the other person would have no security in acting on a demand so made without authority. Thus, the bailee of the chattel, or the lessee of the premises, mentioned in the Illustrations could not safely act on the demand made by a person without authority, for the person really entitled to make the demand might not choose to adopt it (b). Another Illustration is afforded by the case of stoppage in transit. See Section 99 and note.]

(a) Ad. Con., 6th edn., p. 608.

(b) *Lyster v. Goldwin*, 2 Q. B., 143.

REVOCATION OF AUTHORITY.

201. An agency is terminated by the principal
Termination of agency. revoking his authority; or by the
agent renouncing the business of the
agency; or by the business of the agency being
completed; or by either the principal or agent
dying or becoming of unsound mind; or by the
principal being adjudicated an insolvent under the
provisions of any Act for the time being in force
for the relief of insolvent debtors.

[This and the nine following sections lay down the manner in which, and the conditions under which, an agent's authority can be determined. The present section must be read subject to the provisions of Sections 204 and 208. No provision is made for the event of the agent's insolvency. Its effect upon his general authority does not seem to be settled in English law; but it would appear at least to determine his authority to receive money on behalf of his principal. If the contract is in its nature entire, and is incompleated at the time of the agent's death, his representatives cannot complete it nor recover a *quantum meruit*, for the agency is terminated, and apportionment of the agreed sum is impossible (a). See note to Section 65.]

An attorney's retainer is at an end, and, therefore, his power to bind his client ceases, when judgment is recovered (b); but the authority may be renewed by any act showing the client's intention that his attorney shall continue to act in that relation (c). The fact that the relation of principal and agent may be determined by either party at any time, affords one reason for the rule that the Courts do not decree the specific performance of contracts of agency (d). Such contracts appear to be referred to in the Specific Relief Act, Section 21.]

(a) *Cutter v. Powell*, 2 Sm. L. C., 1.

(b) *Macbeath v. Ellis*, 4 Bing., 578.

(c) *Butler v. Knight*, L. R., 2 Ex., 109.

(d) *Cuddee v. Rutter*, 1 W. & T. L. C., 848.

202. Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Termination of agency, where agent has an interest in subject-matter.

Illustrations.

(a.) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his insanity or death.

(b.) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority, nor is it terminated by his insanity or death.

[The rule here laid down seems to go further than the corresponding rule of English law. According to the latter, a license or an authority is not irrevocable, unless it be given for the purpose of securing some benefit to the donee; and the instances of such an authority have generally arisen in cases where it has been given as subsidiary to and part of a security, *e. g.*, where a debtor, in order to discharge his debt, executed a power-of-attorney to his creditor authorizing him to sell lands and receive the proceeds (a). On the other hand, the authority of a factor to sell goods consigned to him, upon the credit of which he has advanced funds, is not irrevocable, unless there is an express agreement to that effect (b): such a factor would, however, have "an interest in the property which formed the subject-matter of the agency," and might be prejudiced by the revocation, and the agency would, therefore, be irrevocable under the present section. The Illustrations are narrower than the section, and seem applicable to the English rule, because in each there is what amounts to an assignment by a debtor to his creditor of a security for his debt. The agent's interest, to which the present section refers, must be in the property forming the subject-matter

(a) *Gausson v. Morton*, 10 B. & C., 731.

(b) *Smart v. Sanders*, 5 C. B., 895; and see p. 916.

of the agency, not merely in the agency; for otherwise the authority of no paid agent could be revoked.]

203. The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

When principal
may revoke
agent's authority.

204. The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Revocation
where authority
has been partly
exercised.

Illustrations.

(a.) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's monies remaining in B's hands. B buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A cannot revoke B's authority so far as regards payment for the cotton.

(b.) A authorizes B to buy 1,000 bales of cotton on account of A, and to pay for it out of A's monies remaining in B's hands. B buys 1,000 bales of cotton in A's name, and so as not to render himself personally liable for the price. A can revoke B's authority to pay for the cotton.

[This section is an amplification of the preceding one. When an agent is employed to negotiate an agreement with a third person, his authority may be revoked at any time while the negotiations are still pending and before the final agreement has been executed. Thus, an auctioneer's authority to sell can be cancelled at any moment previously to the falling of the hammer. See note to Section 122. On the same principle, if a debtor, by an order to his agent, appropriates a fund in his hands to the discharge of the debt, and the agent pledges himself to the creditor so to appropriate the fund, the order is irrevocable (a). If the authority has been partially exercised,

(a) *Hodgson v. Anderson*, 3 B. & C., 842.

the question is, whether its revocation will affect any obligation incurred in the partial execution, either towards the agent, as in Illustration (a), or towards a third party.]

205. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Compensation
for revocation by
principal, or re-
nunciation by
agent.

[See note to next section.]

206. Reasonable notice must be given of such revocation or renunciation, otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

Notice of revo-
cation or renun-
ciation.

[The party who complains under the preceding section of revocation or renunciation, without sufficient cause, before the time agreed, or, under the present section, of revocation or renunciation without reasonable notice, must, it is presumed, show that he has sustained some actual damage. If such damage is proved, the fact that the agency was gratuitous is immaterial. In the case of paid agencies, a revocation, before the agreed time, or without proper notice, must, in all probability, entail damage to the agent. In like manner the principal must almost necessarily suffer, if his agent, after partly executing his commission, suddenly renounces. As to amount of damages recoverable, see Section 73.]

Where a public servant bound himself by his agreement not to quit Government employ without six months' notice, but there was no corresponding provision obliging Government to give him notice, it was held that Government was under no obligation to

give notice before dismissal, but would not be allowed to use this power capriciously to the damage of the servant (a).

When two persons mutually agree, the one to employ the other as his sole agent in a certain business, at a certain place, and for a fixed period, the other that he will act in that business for no other person in that place, there is no condition implied that the business itself shall continue to be carried on during the period fixed. Therefore, no action for breach of the agreement lies if the employer, before the end of the period, sells the business and thereby puts it out of his power to continue the agency (b). A person engaged to act as agent of a company for a certain number of years, has no claim against the company for compensation if it is wound up before those years have elapsed.

In the same case (a) it was held that an indefinite hiring does not, in India, imply an annual hiring, nor the mere monthly payment of wages prove that the hiring is a monthly one.]

207. Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Revocation and renunciation may be expressed or implied.

Illustration.

A empowers B to let A's house. Afterwards A lets it himself. This is an implied revocation of B's authority.

[Instances of the modes in which agencies are terminated are given in Section 201. A revocation is implied from the circumstance of the principal employing another agent in the same business.]

208. The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

When termination of agent's authority takes effect as to agent, and as to third persons.

(a) *Hughes v. Secretary of State*, 7 B. L. R., 688.

(b) *Rhodes v. Forwood*, L. R., 1 App. Cases, 256; *Ex parte Maclure*, L. R., 5 Ch., 737.

Illustrations.

(a.) A directs B to sell goods for him, and agrees to give B five per cent. commission on the price fetched by the goods. A afterwards, by letter, revokes B's authority. B, after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A, and B is entitled to five rupees as his commission.

(b.) A, at Madras, by letter directs B to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B to send the cotton to Madras. B, after receiving the second letter, enters into a contract with C, who knows of the first letter, but not of the second, for the sale to him of the cotton. C pays B the money, with which B absconds. C's payment is good as against A.

(c.) A directs B, his agent, to pay certain money to C. A dies, and D takes out probate to his will. B, after A's death, but before hearing of it, pays the money to C. The payment is good as against D, the executor.

[The law is stated in the same terms by Story (a), but it has been held in England that a revocation of authority by the principal's death operates from the moment of its occurrence. Thus, a wife's authority to pledge her husband's credit for necessaries terminates immediately upon his death, though it is unknown to her or the parties dealing with her (b).]

209. When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Agent's duty
on termination
of agency by
principal's death
or insanity.

[This section, which is not derived from English law, is well illustrated by the following passages from Pothier (c): "The mandate is extinguished by the natural or civil death of the principal (or mandant), when it happens before the agent (or mandatary) has executed it. For example, if I have authorized you to purchase a certain thing for me, the power which I have

(a) Story on Agency, § 470.

(b) Smout v. Ilbery, 10 M. & W., 1.

(c) Cited in Story on Agency, § 492.

given you ceases with my death, and my heirs are not obliged to take, on their own account, the purchase made by you after my death. . . . But, nevertheless, if the agent, being ignorant of the death of the principal, has in good faith transacted the business with which he was charged, the heirs and other representatives of the principal are bound to indemnify him, and to ratify what he has done." Again, he says: "Nevertheless, there are cases in which the agent, although he has knowledge of the death of his principal, not only may, but ought to, act in the business entrusted to him. As, for example, if one is charged with gathering the vintage of another, and hears of the death of his principal at the very time when the vintage cannot properly be deferred, as the grapes of the country are then fit to be gathered, and there is not time to advise his heirs thereof, who live at a distance, there it will be the duty of the agent to gather the vintage notwithstanding such death." The section may be regarded as an amplification of the duty imposed on the agent by Section 189.]

210. The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority), (1) of the authority of all sub-agents (2) appointed by him.

Termination of
sub-agent's au-
thority.

[(1) The sub-agent's authority is not, accordingly, terminated by the termination of the agent's authority, if the sub-agent would, if he were an agent, fall within the provisions of Sections 202—206.

(2) The termination of the agent's authority will not, under this section, terminate the authority of persons whom the agent may have named to act for the principal in the agency-business, and who under Section 194 are not sub-agents.]

AGENT'S DUTY TO PRINCIPAL.

211. An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, accord-

Agent's duty
in conducting
principal's busi-
ness.

ing to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and if any profit accrues, he must account for it.

Illustrations.

(a.) A, an agent engaged in carrying on for B a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to B the interest usually obtained by such investments.

(b.) B, a broker, in whose business it is not the custom to sell on credit, sells goods of A on credit to C, whose credit at the time was very high. C, before payment, becomes insolvent. B must make good the loss to A.

[If an agent deviates from his instructions, express or implied, he is regarded as a wrong-doer and cannot be permitted to set up, as a defence, that the loss or damage might have occurred with equal probability, if his wrongful act had not been done (a). Where a master unnecessarily deviates from the course of his voyage and the goods are afterwards damaged or lost, the shipper is entitled to compensation (b). If an agent improperly deposits money with a banker, who becomes insolvent, the loss must be borne by the agent; so also if he deposits goods in an improper place and they are destroyed by fire. A director of a company, who improperly employs the funds of the company for an object without the scope of the company's operations, is liable to the company for any loss arising from such misapplication.

In these cases of actual breach of duty the loss falls on the agent, although it be not caused by the act which is done or omitted to be done by him.

As a general rule, all profits made by an agent in the course of his employment belong to his principal. If he were allowed to retain the fruits derived from his own unauthorized acts, the law would be holding out to him a premium for the violation of his

(a) Story on Agency, § 219.

(b) Davis v. Garrett, 6 Bing., 716.

duty. Money paid by a principal to his agent for the business entrusted to him can be recovered if the agent departs from the instructions and fails to carry out the business effectually. Thus, where defendant, having been employed by plaintiff to buy goods for him and having received money on account of the price, made a contract contrary to his instructions, and on which plaintiff had no remedy, it was held that plaintiff was entitled to recover the money paid, as having been paid for a consideration which entirely failed (a).]

212. An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses ; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill, or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill, or misconduct.

Illustrations.

(a.) A, a merchant in Calcutta, has an agent, B, in London, to whom a sum of money is paid on A's account, with orders to remit. B retains the money for a considerable time. A, in consequence of not receiving the money, becomes insolvent. B is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss—as, e. g., by variation of rate of exchange—but not further.

(b.) A, an agent for the sale of goods, having authority to sell on credit, sells to B on credit, without making the proper and usual enquiries as to the solvency of B. B, at the time of such sale, is insolvent. A must make compensation to his principal in respect of any loss thereby sustained.

(a) *Bostock v. Jardine*, 34 L. J., Ex., 142.

(c.) A, an insurance-broker employed by B to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A is bound to make good the loss to B.

(d.) A, a merchant in England, directs B, his agent at Bombay, who accepts the agency, to send him 100 bales of cotton by a certain ship. B, having it in his power to send the cotton, omits to do so. The ship arrives safely in England. Soon after her arrival the price of cotton rises. B is bound to make good to A the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

[An agent's liability for neglect or want of skill in the course of his employment is more restricted than that which he incurs, under the preceding sections, by actual deviation from his instructions, for it only extends to the immediate consequences of his neglect or want of skill. As in the 151st Section with regard to bailees, so in this section with regard to agents, no distinction is made between different degrees of care required under different circumstances. A uniform standard is applied indifferently to all cases, whether the agent or bailee is paid as a professional man or acting gratuitously. This section, however, seems rather to contemplate the case of agents professing skill in some particular business, and does not seem designed to embrace the case, for instance, of trustees.]

The care required of a trustee according to the English cases is such as reasonable attention to his own affairs would dictate to him to take of his own property (a). A gratuitous agent is, according to the English rule, liable only for gross negligence. A Solicitor or Surgeon is liable only for acts of gross ignorance or negligence (b). A Solicitor is not, therefore, liable to an action in respect of injury caused by his error on a point of law, on which a reasonable doubt may exist (c). As to remoteness and indirectness of damage, see Section 73 and note.]

(a) *Massey v. Banner*, 1 Jac. & W., 241.

(b) *Purves v. Landell*, 12 Cl. & F., 91, at p. 98.

(c) *Kemp v. Burt*, 4 B. & A., 424.

213. An agent is bound to render proper accounts to his principal on demand.

Agent's accounts.

[“ It is the first duty,” said Sir T. Plumer, “ of an accounting party, whether an agent, a trustee, a receiver or an executor (for in this respect, as was remarked by the Lord Chancellor in *Lord Hardwicke v. Vernon*, they all stand in the same situation), to be constantly ready with his accounts,” and the penalty of violating this duty is, that they may be charged with interest on the amount they retain in their hands; for ordinarily, and except in cases where the debt naturally carries interest, the mere fact of a person having money in his hands belonging to another does not make him liable to pay interest (a).]

214. It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

Agent's duty to communicate with principal.

[An emergency justifies an agent in disregarding his instructions, provided he is unable to communicate with his principal. If such communication might, by reasonable diligence, be effected, and the agent makes default, not only is he guilty of a breach of duty to his principal, but the latter is in some cases entitled to repudiate the act which his agent has done to protect his interests. So, if a master sells or hypothecates his ship, the owner may dispute the title of the purchaser or bond-holder by showing that the master might have communicated with him (b). See Sections 227 and 228.]

215. If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the

Right of principal when agent deals, on his own account, in business of agency without principal's consent.

(a) *Pearse v. Green*, 1 Jac. & W., 140; *Lewin*, 491.

(b) *The Gratitude*, 3 C. Rob., 240.

principal may repudiate the transaction, if the case show, either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Illustrations.

(a.) A directs B to sell A's estate. B buys the estate for himself in the name of C. A, on discovering that B has bought the estate for himself, may repudiate the sale, if he can show that B has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b.) A directs B to sell A's estate. B, on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B informs A that he wishes to buy the estate for himself, but conceals the discovery of the mine. A allows B to buy, in ignorance of the existence of the mine. A, on discovering that B knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

[This and the following sections relate to the case of an agent dealing on his own account in the business of the agency; the one enabling the principal to repudiate the transaction, the other enabling him to claim the benefit derived from it by the agent. The sections are not framed with sufficient latitude to give the principal all the relief, and to impose upon the agent all the liability, recognized in the Court of Chancery. In that Court the agent is regarded as a trustee, and all that scrupulousness of good faith is required of him which the Court expects of a trustee. It is not said that a trustee may not deal with his *cestui que trust*, for instance, by purchasing the estate; but such a transaction, though permitted, is one "of great delicacy and which the Court will watch with the utmost diligence" (a). So, where an agent is employed to sell, he "shall not convert himself into a purchaser, unless he can make it perfectly clear that he furnished his employer with all the knowledge which he himself possessed" (b). "The moment it appears," says Lord

(a) *Coles v. Trecothick*, 9 Ves., 244.

(b) *Lowther v. Lowther*, 13 Ves., 103.

St. Leonards, "in a transaction between principal and agent, that there has been any underhand dealing by the agent,—that he has made use of another person's name as the purchaser, instead of his own,—however fair the transaction may be in other respects, from that moment it has no validity in this Court" (a). It is not sufficient that the agent informs his principal that he has some interest in the transaction, nor that the principal was sufficiently informed to be put upon enquiry, for the principal is entitled to have the fullest information given him and ought not to be driven to an enquiry (b). If the agent fails to satisfy the Court, he is liable to account for the profits gained by him out of the transactions, even although no actual dishonesty can be imputed to him (c). This liability does not seem to be imposed on the agent either by this or the subsequent section. In order to entitle a principal under this section to repudiate a transaction, he must show affirmatively that there has been dishonest concealment by the agent of a material fact, or that the agent's dealings have been disadvantageous to him. The mere fact that the agent has made a profit from the transaction is not sufficient, see note to next section. The question may also arise whether the concealment practised by an agent in such cases as *Dunne v. English* (d) and *Morison v. Thompson* (e) can be called a concealment of a material fact within the meaning of this section. In the former case the matter concealed was, that the agent himself was interested as a purchaser of the thing which he was employed to sell; in the latter, the matter concealed was an arrangement between the agent employed to purchase, and the seller's broker, that they should share the amount allowed by the seller out of his purchase-money as remuneration for his broker. In this case the principal was held entitled to recover from his agent the share so received, on the broad ground that an agent is bound to account for all profits made by him in the course of his employment over and above his proper remuneration. Illustration (a) seems to have been suggested by the case of *Woodhouse v. Meredith*,

(a) *Murphy v. O'Shea*, 2 J. & Lat., at p. 429.

(b) *Dunne v. English*, L. R., 18 Eq., 534, 535.

(c) *Imperial Mercantile Credit Association v. Coleman*, L. R., 6 H. L., 189.

(d) L. R., 18 Eq., 524.

(e) L. R., 9 Q. B., 480.

where it was sought to obtain relief with regard to property which the person whom the plaintiff represented had been employed to sell on behalf of a Corporation, and which he had, as alleged, had conveyed to a trustee for himself, intending in fact secretly to purchase it for himself. The Court, in refusing relief asked for under such circumstances, observed: "An agent or trustee may buy, if his principal or *cestui que trust*, being fully informed of it, is willing; but it cannot be suffered that he should contract secretly, setting up a nominal person, and dealing with his employers in his name. They are thus thrown off their guard; they are led to suppose that they have an agent acting only with a view to their interest, endeavouring to get the best price for them, treating with an adverse purchaser; while, in fact, J. W. is contracting with J. W.: he is fixing the price which he is himself to pay. To call this a contract is an abuse of terms, it is a mere nullity: to a contract there must be two parties" (a).]

216. If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Principal's right to benefit gained by agent dealing on his own account in business of agency.

Illustration.

A directs B, his agent, to buy a certain house for him. B tells A it cannot be bought, and buys the house for himself. A may, on discovering that B has bought the house, compel him to sell it to A at the price he gave for it.

[This section relates to the case of an agent dealing on his own account in the business of the agency, instead of on account of the principal. It gives the principal a right, upon discovery of the agent's dealing, to claim the profits which may have arisen from it. In the circumstances mentioned in the Illustration, the Court of Chancery would declare the agent to be a trustee of the house for his principal.]

(a) 1 Jac. & W., at pp. 222, 223.

An auctioneer employed to sell a horse at an upset price, and himself buying in the horse at auction and selling him shortly afterwards at a higher price, has been held not to be an agent dealing in the business on his own account instead of on account of his principal. In the case referred to, it was decided that the principal had no redress against the auctioneer, unless he could show that there had been dishonest concealment, or that the auctioneer's dealings had been disadvantageous to him (*a*). The decision would, it is submitted, have been otherwise in an English Court, see note to Section 215.]

217. An agent may retain, out of any sums received on account of the principal in the business of the agency, all monies due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Agent's right
of retainer out
of sums received
on principal's ac-
count.

[The right given to agents by this section is identical with that conferred on bailees by Sections 170 and 171. Of course the agent's disbursements must constitute a legal debt and must not have been made as a matter of favour, and they must also have been made before he had notice of the termination of his authority. His lien will, it is submitted, cover any claims which he may have under Section 222.

According to English law, if an agent employ a sub-agent without his principal's consent, then, as there is no privity between the principal and the sub-agent, the latter has no right of lien against the principal. But, where a sub-agent is properly appointed, he is entitled, by way of substitution, to all the rights which the agent himself has against the principal. A person who acts as agent for another without knowing that the latter is himself an agent, is entitled to all the rights against the other which he would have if such agent were a principal (*b*).

(*a*) *Vannigon v. Maclean*, Mad. H. C., Original period.

(*b*) *Mann v. Forrester*, 4 Camp., 60.

The right of attorneys to retain their costs out of the proceeds of what they obtain for their clients is clearly recognized by the English Courts: and the Court will, under certain circumstances, enforce this right as against the other party to the suit, by ordering any payment, due by such party under the suit to the attorney's client, to be made to the attorney, or by ordering him to pay the attorney his costs. The law was thus laid down by Blackburn, J., in a case (*a*) where the plaintiff's attorney applied that his costs should be paid by the defendant, on the ground that the parties had compromised the suit without his knowledge. "There is," said the learned Judge, "no doubt at all that where an attorney has by his labor or his money obtained a judgment for his client, he has a lien upon the proceeds of such judgment, and is entitled to have its proceeds pass through his hands. The lien does not amount to an equitable assignment of the proceeds of the judgment, but it is yet protected by the Court. Whether there has been an actual judgment, or whether the fruits of the litigation have been obtained without a judgment, if an arrangement is made to prevent the attorney from reaping the benefit of his lien, the Court may set aside such an arrangement, or may force the parties who have so deprived the attorney, to pay the costs for which the attorney had the lien. It is not necessary to define what would be a proper case for the interference of the Court. If a judgment were obtained, or a debt ascertained to be due, and an agreement were made to give the plaintiff more than he could get in the ordinary course, there would probably be a case for the interference of the Court. Other cases might be suggested. These are cases where the fruits of the litigation have been substantially obtained. I do not think that the fact that judgment has or has not been signed is conclusive on the point." In that case it was held that there was no ground for the interference of the Court, because there was no collusion between the parties, and the compromise was made when the result of the litigation was still uncertain.]

Agent's duty to
pay sums received
for principal.

218. Subject to such deductions, the agent is bound to pay to his principal all sums received on his account.

(*a*) *Ex parte Morrison*, L. R., 4 Q. B., at p. 156.

219. In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act (1) ; but an agent may detain monies received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete (2).

When agent's remuneration becomes due.

[(1) The general rule as to commissions is, that the whole service or duty must be performed before the right to commission attaches, and, therefore, if an agent's authority is revoked before the business is completed, as in the Illustration to Section 207, he can claim no commission. He may, however, be entitled to compensation under Section 205 or 206.

(2) The provision contained in the latter part of the section would seem to be inserted by way of explanation to Sections 217 and 221. If part of the goods consigned to him has been sold when the agent's authority is revoked, he is *pro tanto* entitled to commission, and therefore to his lien, as well in respect of it, as of his disbursements, upon all the goods. If the whole sale is incomplete, he is not entitled to any commission ; but he is, under Section 221, entitled to a lien on the goods for his disbursements.]

220. An agent who is guilty of misconduct in the business of the agency, is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Agent not entitled to remuneration for business misconducted.

Illustrations.

(a.) A employs B to recover 1,00,000 rupees from C, and to lay it out on good security. B recovers the 1,00,000 rupees and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A loses 2,000 rupees. B is entitled to remuneration for recovering the 1,00,000 rupees, and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to B.

(b.) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss.

[The breach of any of the duties specified in the preceding Sections (211—216) is, apparently, embraced in the term misconduct. It follows that, in the cases mentioned in the Illustrations to Sections 211 and 212, the agent would not be entitled to any commission. If the part of the business in which the agent has misconducted himself can be severed from the rest, then he is entitled to commission in respect of the latter part, as is shown in the first Illustration to this section: but in the Illustrations to Sections 211 and 212 the matter does not seem to allow such severance.]

221. In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether moveable or immoveable, of the principal received by him, until the amount due to himself for commission, disbursements, and services in respect of the same has been paid or accounted for to him.

Agent's lien on principal's goods and papers.

[Section 217 enables the agent to retain money due to himself out of moneys received on behalf of the principal. The present section gives him, in respect of money so due, a lien on property of the principal which may come into his hands. An auctioneer in possession of goods has a lien on them for the charges of the sale and his commission (a).]

By the mention of immoveable property it appears to be intended to confer immediately on attorneys the same right as, by virtue of 23 & 24 Vic., c. 27, they may enjoy through the intervention of the Court.

This section, in its terms, gives a special lien only (Section 170); but those persons who fill any of the characters specified in Section 171 will, under that section, enjoy a general lien.]

(a) *Williams v. Millington*, 1 H. Bl., 81, at pp. 84, 85, cited in *Wolfe v. Horne*, 2 Q. B. D., at p. 358.

PRINCIPAL'S DUTY TO AGENT.

222. The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Agent to be indemnified against consequences of lawful acts.

Illustrations.

(a.) B, at Singapore, under instructions from A of Calcutta, contracts with C to deliver certain goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorizes him to defend the suit. B defends the suit, and is compelled to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.

(b.) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs, and incurs expenses. A is liable to B for such damages, costs and expenses.

[This section gives the agent the same rights as against his employer as the surety has, under Section 145, against the principal debtor. The acts of an agent may entail loss or damage to him, either because he has made himself personally liable on a contract with a third person, or because he has committed a wrong against a third person. In the former case his right to be indemnified will depend upon the terms of the authority under which he acted, and the amount he may recover will be regulated by the rules given in Section 125. See also notes to Sections 70 and 189. In the latter case his right to be indemnified is defined by the two following sections.]

223. Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Agent to be indemnified against consequences of acts done in good faith.

Illustrations.

(a.) A, a decree-holder and entitled to execution of B's goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions.

(b.) B, at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands over the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of the goods and costs. A is liable to indemnify B for what he has been compelled to pay to C, and for B's own expenses.

[Although the act which the agent is employed to do may come within the provisions of Section 23, by being "fraudulent or involving or implying injury to the property of another," yet the character of the act will not affect the agent's right to be indemnified, if he has acted in good faith, that is, in ignorance of the facts which give the act its illegal character (a).]

The general maxim is, that there is no contribution among wrong-doers; but where an agent does, in innocence, an act which is in fact a wrong to some third person, the reason of the maxim is inapplicable, and the agent is, therefore, entitled to his indemnity.

This section does not entitle the agent to be indemnified in respect of damages for which he may become liable in consequence of his own negligence in doing acts for his principal, which do not necessarily involve consequences injurious to third persons.]

224. Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise to indemnify him against the consequences of that act.

Non-liability of employer of agent to do a criminal act.

Illustrations.

(a.) A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C, and has to pay

(a) *Merryweather v. Nixan*, 2 Sm. L. C., at p. 483.

damages to C for so doing. A is not liable to indemnify B for those damages.

(b.) B, the proprietor of a newspaper, publishes, at A's request, a libel upon C in the paper, and A agrees to indemnify B against the consequences of the publication, and all costs and damages of any action in respect thereof. B is sued by C and has to pay damages, and also incurs expenses. A is not liable to B upon the indemnity.

[Where the act itself which the agent is employed to perform amounts to an offence, there can be no question that the promise on the part of the principal to indemnify him is illegal, and therefore void. But if the act done is not apparently illegal in itself, and is done honestly and *bond fide* and in compliance with the directions of another, that other is bound to indemnify the agent if the act occasions an injury to the rights of third persons. Thus, where the plaintiff, being desired by the defendants to surrender to them certain trucks, offered to do so on receiving an indemnity against the claims of certain third parties, and finally did surrender them without actually receiving the indemnity, it was held that the plaintiff, having had an action brought against him by the third parties, was entitled to claim an indemnity from the defendants (a).]

225. The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Compensation to agent for injury caused by principal's neglect.

Illustration.

A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt. A must make compensation to B.

[Particular stress must be laid on the fact that the injury complained of is caused by the principal's neglect or want of skill; for if it proceed from the agent's own negligence, or from the nature of the employment, it is not actionable within the section, nor within the rules of Common law. It would be beyond the scope of this Act to enter into the question of contributory

(a) *Dugdale v. Lovering*, L. R., 10 C. P., 196, following *Betts v. Gibbins*, 2 Ad. & E., 57.

negligence. It is sufficient to state the proposition which may be deduced from the English cases, *viz.*, that a plaintiff is disentitled to recover in an action for negligence, if the defendant shows that the plaintiff could by reasonable means have avoided the consequences of the defendant's negligence (*a*). Equally obvious is the justice of the other requirement mentioned, namely, that the injury suffered by the agent should not proceed from the nature of his employment. The commonest application of this rule is to the cases when a servant is injured through the negligence of some of his fellow-servants. If the injury is received by him in the course of his employment, and if the risk is of such a nature as that it may be considered to be a natural and necessary consequence of his employment, then the master is not to be held liable; for it may be said that the servant took upon himself the risk which he foresaw or ought to have foreseen (*b*). The class of cases in which a master has been held liable for injuries caused to his servant by improper and dangerous implements or materials used in his service, is limited to those in which the master has known of the defect (the servant being ignorant of it) and has shown a reckless disregard of the safety of the servant.]

EFFECT OF AGENCY ON CONTRACTS WITH THIRD PERSONS.

226. Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences, as if the contracts had been entered into and the acts done by the principal in person.

Enforcement
and consequences
of agent's
contracts.

Illustrations.

(*a*.) A buys goods from B, knowing that he is an agent for their sale, but not knowing who is the principal. B's principal is the

(*a*) *Tuff v. Warman*, 27 L. J., C. P., 322; *The Flying Fish*, 34 L. J., Ad., 113.

(*b*) *Morgan v. Vale of Neath Ry. Co.*, L. R., 1 Q. B., 149; *Tunney v. Midland Ry. Co.*, L. R., 1 C. P., 291; *Fowler v. Lock*, L. R., 7 C. P., 272; *ib.*, 9 *ib.*, 751; *ib.*, 10 *ib.*, 90.

person entitled to claim from A the price of the goods, and A cannot, in a suit by the principal, set-off against that claim a debt due to himself from B.

(b.) A, being B's agent, with authority to receive money on his behalf, receives from C a sum of money due to B. C is discharged of his obligation to pay the sum in question to B.

[The agent who makes a contract as agent, is a mere instrument through which the contract between the parties is effected. He acquires no right of action under the contract; thus, where a clerk, shopman or other servant sells goods on behalf of his employer, he cannot sue for the price (a); and where one agent sues another, the action must fail, as there is no contract between them (b). On the other hand, where a man deals with an agent, knowing him to be such, he must look to the principal and cannot set up, as against the principal, rights which he may have against the agent. This is shown in Illustration (a).

Illustration (b) points to the necessity of the authority being strictly complied with. If, under the circumstances, A received a bill of exchange instead of money, C would not be discharged.]

227. When an agent does more than he is authorized to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his authority, so much only of what he does as is within his authority is binding as between him and his principal.

Principal how far bound when agent exceeds authority.

Illustration.

A, being owner of a ship and cargo, authorizes B to procure an insurance for 4,000 rupees on the ship. B procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

[An agent may deviate from his instructions by doing something different from what he was employed to do, by doing

(a) Story on Agency, § 391.

(b) Depperman v. Hubbersty, 17 Q. B., at p. 771.

something short of what he was employed to do, or by doing something in excess of what he was employed to do. This and the following section deal only with the latter case. The general rule is thus laid down by Lord Coke: "Regularly, it is true, that where a man doth less than the commandment or authority committed unto him, there (the commandment or authority being not pursued) the act is void. And where a man doth that which he is authorized to do and more, there it is good for that which is warranted, and void for the rest; yet both these rules have divers exceptions and limitations" (a). The present section embodies the latter part of Lord Coke's dictum by providing that, if the part done by the agent in excess of his authority is severable from that which is within the scope of his authority, his acts, so far as they are within the scope of his authority, will be binding on his principal.

The same rule is, apparently, applicable where the agent's act falls short of what he was employed to do. A partial performance would, it is submitted, bind the principal if it could be separated from the entire performance and if the principal derive substantial benefit from it. Thus, if an agent, having been directed by a merchant to procure two policies on a ship, after having procured one, fails to procure the other, the merchant would be bound to pay the premium on the policy procured. In *Baines v. Ewing* (b), a broker, being authorized by the defendant to underwrite policies to an amount not exceeding £100, underwrote one in favor of the plaintiff for £150. The Court was of opinion that the contract was indivisible, and that the plaintiff was entitled to recover under it all or nothing, according as the contract was held to be binding or not on the defendant. Under the present section, it would, apparently, not be binding.]

228. Where an agent does more than he is authorized to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognize the transaction.

Principal not bound when excess of agent's authority is not separable.

(a) Co. Lit., 258 a.

(b) L. R., 1 Ex., 320.

Illustration.

A authorizes B to buy 500 sheep for him. B buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A may repudiate the whole transaction.

[If the agent exceeds his instructions in such a manner that the excess cannot be separated from that which he was authorized to do, then his act does not bind his principal. Of course if the agent does something altogether different from his instructions, the principal is not bound. Thus, if, being authorized to sign a note payable in six months, he signs one payable in sixty days, it would be void.

“Where a principal instructed his agent to enter into a contract for the delivery of cotton at the end of Kártik, but the agent entered into a contract for the delivery thereof by the middle of that month: it was held that the agent exceeded his authority in such a manner as to exempt the principal from liability upon the contract.

“Though the objection assigned by a principal for repudiating a contract at the time of such repudiation be unfounded, he is not precluded from subsequently availing himself of other valid objections. A custom which allows a broker to deviate from his instructions is unreasonable, and the Courts of law will not enforce it” (a).]

229. Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Consequences
of notice given
to agent.

Illustrations.

(a.) A is employed by B to buy from C certain goods, of which C is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A learns that the goods really belonged to D,

(a) *Arlápá Náyak v. Narsi Keshavji & Co.*, 8 Bom. H. C. R., A. C. J., 19.

but B is ignorant of that fact. B is not entitled to set-off a debt owing to him from C against the price of the goods.

(b.) A is employed by B to buy from C goods of which C is the apparent owner. A was, before he was so employed, a servant of C, and then learnt that the goods really belonged to D, but B is ignorant of that fact. In spite of the knowledge of his agent, B may set-off against the price of the goods a debt owing to him from C.

[This section, like the 238th, is founded on the legal identity which exists between the principal and his representative. In the case upon which the Illustrations are founded, Pollock, C. B., laid down the law in rather more general terms: "In a commercial transaction of this description," he said, "where the agent of the buyer purchases on behalf of his principal goods of the factor of the seller, the agent having present to his mind at the time of the purchase a knowledge that the goods he is buying are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, is the knowledge of the principal" (a). A similar rule is laid down by Lord St. Leonards:—"Where one transaction is closely followed by and connected with another, or where it is clear that a previous transaction was present to the mind of the solicitor when engaged in another transaction, the notice to the solicitor is notice to the client" (b). The question, therefore, according to these authorities, would be whether the agent would, while transacting the business, have the previous transaction present in his mind. Under this section it is clear that the agent's knowledge would not affect the principal unless it was gained during the agency. Notice of dishonor of a bill is valid against the drawer, if given to an agent who has the general conduct of his business (c). The proposition that information received by an agent binds his principal is sometimes put on the ground that it is the agent's duty to communicate it to his principal. Thus, in marine insurance cases, it has been held that, if the master of a ship fails to communicate to his owner facts relating to the ship, and the owner effects an insurance without communicating to the underwriters such material facts, the latter may avoid the policy

(a) *Dresser v. Norwood*, 17 C. B., N. S., at p. 481.

(b) *Sugden's Vendors and Purchasers*, 757.

(c) *Byles on Bills*, 281.

on the ground of concealment and misrepresentation. "On general principles of policy," observed Ashurst, J., "the act of the agent ought to bind the principal: because it must be taken for granted, that the principal knows whatever the agent knows. And there is no hardship on the plaintiff: for, if the fact had been known, the policy could not have been effected" (a). The same principle was applied in *Proudfoot v. Montefiore* (b).]

230. In the absence of any contract to that

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them (1).

Presumption of contract to contrary.

Such a contract shall be presumed to exist in the following cases:—

- (1.) Where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad (2):
- (2.) Where the agent does not disclose the name of his principal (3):
- (3.) Where the principal, though disclosed, cannot be sued (4).

[(1) The question whether the agent or the principal is the actual party to the contract is, in the case of written agreements, a question of construction; in the case of unwritten contracts it is a matter of inference from the circumstances. "The difference is, that if the contract is by word of mouth, it is not possible to say from the agent using the words, 'I' and 'me,' that he meant himself personally; whereas, if the contract is in writing, signed in his own name, and speaking of himself as contracting, the natural meaning of the words is, that he binds himself personally, and accordingly he is taken to do so." "It is well settled that an agent is responsible, though known by the other party to be agent, if by the terms of the contract he

(a) *Fitzherbert v. Mather*, 1 T. B., 12.

(b) L. B., 2 Q. B., 511.

makes himself the contracting party" (a). But evidence may be given of usage that persons so signing are nevertheless to be liable only under certain circumstances, for instance, if the principal's name is not disclosed within a given time (b).

It has been considered that, if a person signs 'as agent,' or 'on behalf of,' or 'per procuration,' he can neither sue nor be sued on the agreement (c), whereas the mere fact of the instrument being stated to be made between A and B as agent for C does not exonerate B from liability (d). But the better opinion seems to be, that the proper mode of construction is to take each contract by itself, in order to see whether the person signing did so as agent or on his own account (e). *Primâ facie* a man who signs a contract in his own name is a contracting party, but effect should be given to plain words wherever they occur, showing that he contracted on behalf of somebody else. Accordingly, a sold note running thus—"Sold to you on account of A B," &c., and signed by the defendants without any addition, has been held to show an intention to make the foreign principals of the defendants, and not the defendants themselves, liable (f). If the words referring to the representative character of the person who has signed are intended to be merely words of description, and not to amount to a statement that he was bargaining on behalf of another, then they would not relieve him from liability (g). When it appears upon a written contract that the agent is liable, he is not entitled to discharge himself by reason of his agency, for the effect of the written instrument cannot be varied by oral evidence. On the other hand, there is nothing to prevent the production of evidence to show that the person who is not liable on the face of the contract is, in fact chargeable under it (h).

(a) *Williamson v. Barton*, 31 L. J., Ex., at pp. 174, 175.

(b) *Humfrey v. Dale*, 27 L. J., Q. B., 390; *Fleet v. Murton*, L. R., 7 Q. B., 126; *Hutchinson v. Tatham*, L. R., 8 C. P., 482.

(c) *Lennard v. Robinson*, 24 L. J., Q. B., 275; *Paice v. Walker*, L. R., 5 Ex., 173; *Fairlie v. Fenton*, *ib.*, 169.

(d) *Tanner v. Christian*, 24 L. J., Q. B., 91.

(e) *Southwell v. Bowditch*, 1 C. P. D., 374.

(f) *Gadd v. Houghton*, 1 Ex. D., 357, practically overruling *Paice v. Walker*, L. R., 5 Ex., 173.

(g) *Ibid.*

(h) *Higgins v. Senior*, 8 M. & W., at p. 844.

There are, in English law, three exceptions to the rule that the principal may sue or be sued upon a contract made by an agent. The first is where the agent has executed a deed in his own name. In this case, although the contract is expressed to be made between A as agent of P on the one part, and T on the other, A, and not P, must sue on the deed (*a*). The person to be sued upon a deed must be the person who is party to the deed. This rule is, apparently, not intended to be reproduced in the present Act. The second exception is in the case of bills of exchange and notes, as to which, says Byles, "the law is different in one respect; to wit, that where the principal's name does not appear, he is not liable on a bill or note as a party to the instrument." See note (1) to Section 251, (*b*). The third exception is provided for in the first words of the section: "A contract to that effect" is implied when the party dealing with the agent knows his character and yet gives him exclusive credit. He thereby makes his election and cannot afterwards charge the principal.

(2) As an instance of an agent being entitled to sue may be cited the case of an auctioneer; he may sue for the price, and may be sued for non-delivery of the goods sold, nor does it seem to be material that his principal is disclosed (*c*). When it appears upon a written contract that the agent is liable, he is not entitled to discharge himself by reason of his agency; for when a person deals with an agent whose principal is abroad, he presumably gives credit to the agent. "According to the universal understanding of merchants, and of all persons in trade, the credit is then considered to be given to the British buyer and not to the foreigner" (*d*). This, however, is only a presumption and not a rule of law, and, therefore, if the contract is made expressly with the foreigner, the agent is not liable (*e*). The consequence of the general rule is that, on the one hand the foreign principal cannot sue or be sued on the contract (*f*),

(*a*) *Berkeley v. Hardy*, 5 B. & C., 355.

(*b*) *Byles on Bills*, 37.

(*c*) *Woolfe v. Horne*, 2 Q. B. D., 355.

(*d*) *Per Lord Tenterden, Thomson v. Davenport*, 2 Sm. L. C., 286.

(*e*) *Mahony v. Kekulé*, 14 C. B., 390.

(*f*) *Elbinger Actien-Gesellschaft v. Clays*, L. R., 8 Q. B., 313, where foreign principal was plaintiff; *Armstrong v. Stokes*, L. R., 7 Q. B., 598, where he was defendant; *Hutton v. Bullock*, L. R., 8 Q. B., 331; *ib.*, 9 *ib.*, 572.

and on the other hand the agent for the foreign principal can sue and be sued (a).

(3) An undisclosed principal, as the expression is used in the English cases, is either a principal who is known to exist but whose name is not known to the party entering into the contract, or a principal whose existence is unknown. In either case the agent must necessarily contract in his own name, and in either case he or his principal may sue or be sued. "It is a well-established rule of law, that where a contract, not under seal, is made with an agent, in his own name, for an undisclosed principal, either the agent or the principal may sue upon it" (b). When the person sought to be made liable is known to be an agent for some person unknown, he is liable, unless there are circumstances disentitling "the giver of the credit to treat him as making his own a transaction in the interest of that other" (c).

(4) According to Section 183, a person who is not of age, or not of sound mind, cannot employ an agent at all. This section must, therefore, be intended to apply to persons who are otherwise disqualified from contracting under Section 11, or who are out of the jurisdiction. In England a Parish cannot be sued, and so, where certain persons agreed, on behalf of a Parish, to pave the streets, they were held personally liable on the agreement (d). In such cases it must be noted that the agent's personal liability is only a presumption which may be rebutted; the person dealing with the agent may have known that he had no authority to bind his principals, and yet have been content to deal with the agent, not relying upon his personal credit, but upon the faith of being paid by his principals (e).

The Act omits all notice of public agents, who stand according to English law in an exceptional position. In the ordinary course of things a public agent is not personally liable upon a contract made under circumstances which would render

(a) *Fairlie v. Fenton*, L. R., 5 Ex., at p. 171, where agent was plaintiff; *Paice v. Walker*, L. R., 5 Ex., 173, where he was defendant.

(b) *Sims v. Bond*, 5 B. & A., at p. 393.

(c) *Pater v. Gordon*, 7 Mad. H. C., at p. 84.

(d) *Meriel v. Wymandsold*, Hardres R., 205.

(e) Story on Agency, § 287.

him liable if the agency were of a private character. The reason of this rule is two-fold; first, because the natural presumption is, that contracts made with a public officer were made upon the credit and responsibility of the Government, and that it is ready and able to fulfil them liberally; and, secondly, because it would deter persons from accepting offices of trust under Government, if they were held liable in their official contracts. In the absence of both these reasons, the presumption of official immunity may be rebutted; thus, where it is shown that the party dealing with a public agent was unaware of his character, it may be presumed that credit was given to him personally. Another distinction between private and public agents is in the effect of their representations and admissions. The Government is not bound by them unless it clearly appears that they were authorized to make them (*a*). Thus, Government is not bound by the admission of a Collector; nor are Government officials responsible for the neglect of their subordinates though appointed by them in the same business (*b*).]

231. If an agent makes a contract with a person

Rights of parties to a contract made by agent not disclosed.

who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal (1).

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract (2).

(*a*) *Secretary of State v. Kamachee Boye Sahaba*, 7 M. I. A., 476.

(*b*) *Collector of Masulipatam v. Cavaly Vencata Narrainapah*, 8 M. I. A., at p. 554; *Lane v. Cotton*, 1 Ld. Raym., 646; *Mersey Docks Trustees v. Gibbs*, L. R., 1 H. L. C., 93; *Buron v. Denman*, 2 Ex., 167.

[(1) "It is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom, in point of law, it was made"(a). Thus, where one person bought goods in his own name, but two others were jointly interested with him in the purchase, it was held that all might join in suing the vendor. This right of undisclosed persons to intervene and claim the benefit of a contract is subject to the condition, that the other party to it is not prejudiced thereby, or, in other words, that he is not deprived of any of the defences which would have been available to him against the agent at the time of the disclosure, had that agent been really a principal. If, therefore, a person has debts owing to him from those who deal with him as principals solely interested in the transaction, he is entitled to set-off those debts in an action brought against him by other persons who may be interested in the transaction. But, on the other hand, where a buyer dealt through an agent who knew that the goods were not the property of the apparent seller, it was held that he was disentitled to such set-off, the knowledge of the agent being equivalent to that of the buyer, his principal (b). The same rule is provided by Illustration (b) to Section 229.

(2) At any time before the contract is complete, the party who supposed he was dealing with a principal, when in fact he was dealing with an agent, may, under certain circumstances, repudiate the contract (c). He has, in fact, been mistaken; but his mistake does not make the contract voidable unless it was material, and in most cases the mistake is not material. If, however, he can show that he would not have entered into the contract with an agent, or would not have entered into it with the particular person who happens to be principal, then he may refuse to fulfil the contract. Apart from considerations arising from the state of accounts between the parties, probably the only case in which a person would be held to have this right of refusal to perform the contract, would be a case where the per-

(a) *Cothay v. Fennell*, 10 B. & C., at p. 672.

(b) *Dresser v. Norwood*, 34 L. J., C. P., 48.

(c) *Borries v. Imperial Ottoman Bank*, L. R., 9 C. P., 38.

sonal capacity or character of the one party was a material circumstance in inducing the other to enter into the contract (a).]

232. Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

Performance
of contract with
agent supposed
to be principal.

Illustration.

A, who owes 500 rupees to B, sells 1,000 rupees worth of rice to B. A is acting as agent for C in the transaction, but B has no knowledge nor reasonable ground of suspicion that such is the case. C cannot compel B to take the rice without allowing him to set-off A's debt.

[This section states the same rule with the same qualification as is contained in the first paragraph of the preceding section. The principle is well established by the English cases. Thus, in *Addison v. Gandassequi*, Lord Mansfield said: "If Hodgson (the undisclosed principal) had really paid Smith, Lindsay, and Co. (the insolvent actual purchasers), it would have depended upon circumstances, whether he would be liable to pay for the goods over again; if it would have been unfair to have made him liable, he would not have been so" (b). So, again, in *Thomson v. Davenport* (c), Lord Tenterden observed:—"I take it to be a general rule, that if a person sells goods, supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the princi-

(a) *Robson v. Drummond*, 2 B. & Ad., 303.

(b) 4 Taunt., at p. 577.

(c) 9 B. & C., 78; 2 Sm. L. C., 327.

pal and the agent is not altered to the prejudice of the principal." This qualification of the general rule, that a person may have recourse to an undisclosed principal to whom he never gave credit, was affirmed in a recent case, where the plaintiff, who had had previous dealings with R. & Co., which he settled with them as principals, sold to them shirtings on credit, and, before payment was made, R. & Co. became insolvent. R. & Co. had, as the plaintiff after their insolvency discovered, been buying for defendants, and had before their insolvency received from them payment for the goods in the usual course of business. It was held that the plaintiff could not recover the price from the defendants after their *bond fide* payment to R. & Co., at a time when plaintiff still gave sole credit to R. & Co., and knew of no one else as principal (a).]

233. In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

Right of person dealing with agent personally liable.

Illustration.

A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

[An agent is personally liable, when he has either actually made himself party to a contract, or where the law presumes that he is a party. As the person really interested may intervene and sue upon the contract as plaintiff, so also he may be sued upon it. There is nothing to prevent the seller from insisting upon having both principal and agent liable to him at the same time (b). Their obligation, however, is not joint, and, as is provided in the next section, a person may be estopped from pursuing his remedy against one or the other of them.

The right to recover against an agent may be affected by his relation to his principal, in the same way as the right to recover against the principal is qualified by the latter's relation

(a) *Armstrong v. Stokes*, L. R., 7 Q. B., 598.

(b) *Calder v. Dobell*, L. R., 6 C. P., 486.

with his agent. Thus, where a person seeks to enforce against an agent the right conferred by Section 72, *viz.*, to recover money paid under a mistake, it is a good answer for the agent to say that he has in good faith paid over the money to his principal, having received no notice to the contrary. "The law is clear," said Lord Mansfield, "that if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal.....But, on the other hand, shall a man, though innocent, gain by a mistake, or be in a better situation than if the mistake had not happened? Certainly not" (a). Where defendant was acting as agent for a foreign principal, and the plaintiff, knowing that fact, and having paid him in that capacity, sought to recover back a sum paid under a mistake, it was held that, the defendant having been "altogether an agent" in the matter, there was nothing to take him out of the ordinary protection to which an agent is entitled, who pays money to his principal before he receives notice not to pay it (b). If the defendant is not "altogether an agent," or "gains by the mistake," or is himself a wrong-doer, the defence cannot be maintained. Thus, where A bought cotton of B, both being brokers and acting for undisclosed principals, and a mistake was made, in consequence of which A paid B too much, but, before the mistake was discovered, B had allowed the money so received to be settled in account between himself and his principals, to whom he had made advances; it was held that A was entitled to recover back the sum overpaid, because B was not a mere agent but received the money for his own use and benefit (c). If the agent is himself a wrong-doer, as in *Tugman v. Hopkins* (d), where the defendant interfered with property of the plaintiff without his consent, he cannot relieve himself from liability by handing over the property to another party. However innocent in intention such a person may be, he is none the less in point of law a trespasser (e). On the authority of *Tugman v. Hopkins*, it was decided in Allahabad, that a banker who, himself

(a) *Buller v. Harrison*, 2 Cowp., 568.

(b) *Holland v. Russell*, 30 L. J., Q. B., 297.

(c) *Newall v. Tomlinson*, L. R., 6 C. P., 405.

(d) 4 M. & G., 389.

(e) *Kirk v. Gregory*, L. R., 1 Ex. D., 55.

acting in perfect innocence, had been used by a fraudulent clerk as an instrument for obtaining money from Government on a forged requisition, was liable to refund the money, although he had paid over the amount in the ordinary course of business to his employer (a).]

234 When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.

[A person who has both principal and agent liable to him upon the contract may lose his remedy against either of them by inducing him to believe, and to act upon the belief, that he is going to hold the other only liable. Difficult questions arise as to whether, in the circumstances of the case, there is anything to exclude or negative the liability of one or the other. It has been decided in England that the fact of suing one party to judgment, even without satisfaction, is a conclusive election not to sue the other (b). But the filing of an affidavit of proof against the estate of an insolvent agent after the disclosure of the principal, has been held not to show a conclusive election by the creditor to treat the agent as his debtor (c). In *Calder v. Dobell* (d), it was held that the insertion of the agent's name in the contract, and the fact of demands being made on him for payment, did not discharge the principal. If the conduct of the other party induces the principal to pay the agent or alter the state of accounts between them, he is then precluded from proceeding against the principal. "A person," said Lord Ellenborough, "selling goods is not confined to the credit of a broker who buys them ; but may resort

(a) *Shugan Chand v. The Govt.* N. W. P., I. L. R., 1 All., 79.

(b) *Priestley v. Fernie*, 3 H. & C., 977.

(c) *Curtis v. Williamson*, L. R., 10 Q. B., 57.

(d) L. R., 6 C. P., 186.

to the principal on whose account they are bought.If he lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if, in that case, the price of the goods has been paid to the broker, on account of this deception the principal shall be discharged" (a). On the other hand, the mere fact of the principal having paid his agent does not discharge the principal, unless such payment was authorized or induced by the representations or conduct of the creditor (b).

On the general principle that, where a person's right against one individual is capable of assuming two forms, he must elect which form of the right he will exercise, a plaintiff, having elected to sue defendant as principal on a contract, cannot afterwards sue him as agent liable by custom as a principal. He is bound by his election once made (c).]

235. A person untruly representing himself to be the authorized agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

[This section is directed to cases in which the alleged principal is named: where no principal is named, it cannot be said that the third person has been induced by the pretended agent's misrepresentation to deal with him: in that case, moreover, the agent would himself be liable on the contract under Section 230, (2). Though a person who contracts in the name, but without the authority, of another cannot himself be sued for a breach of the contract, he may be sued "so as to be liable in damages" for the loss sustained by the person with whom he has entered into the contract. The fact that he has acted under the honest belief that he had authority does not affect his liability to this action.

(a) *Kymer v. Suwercropp*, 1 Camp., at p. 111.

(b) *Heald v. Kenworthy*, 10 Ex., 739.

(c) *Devráv Krishna v. Hálambháí*, I. L. R., 1 Bomb., 87.

To quote the words of Willes, J., in *Collen v. Wright* (a), "The fact that the professed agent honestly thinks that he has authority, affects the moral character of his act; but his moral innocence, in so far as the person he has induced to contract is concerned, in no way aids him, or alleviates the inconvenience and damage which he sustains." The 208th Section saves the agent whose authority has, without his knowledge, expired at the time of his making the contract, from liability under this section.]

236. A person with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it, if he was in reality acting, not as agent, but on his own account.

Person falsely contracting as agent, not entitled to performance.

[When the principal is named, the agent is disabled from suing under Section 230: where no principal is named, but a contract is made by a person untruly holding himself out as an agent, he is precluded by the present section from enforcing the contract, notwithstanding the presumption stated in Section 230, (2). This is an important departure from the English rule, that a person contracting in the character of agent, without having any real principal, may in general sue upon the contract himself (b).]

This section must be construed with the proviso that, if a person after having full knowledge that the alleged agent was really a principal, still allows him to perform his contract, he cannot then object to his proceeding against him in his own name. Thus, where defendant, after having discovered that plaintiff was himself principal, accepted delivery of part of the goods under the contract and paid for them, it was held that plaintiff was entitled to sue for the remainder (c). Where the personal qualities of the alleged principal are a material ingredient in the contract, the section could fairly be allowed to operate, even although the contract might be in part performed.]

(a) 27 L. J., Q. B., at p. 217.

(b) *Schmaltz v. Avery*, 20 L. J., Q. B., 229.

(c) *Rayner v. Grote*, 15 M. & W., 359.

237. When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Liability of principal inducing belief that agent's unauthorized acts were authorized.

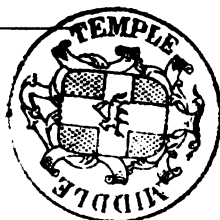
Illustrations.

(a.) A consigns goods to B for sale, and gives him instructions not to sell under a fixed price. C, being ignorant of B's instructions, enters into a contract with B to buy the goods at a price lower than the reserved price. A is bound by the contract.

(b.) A entrusts B with negotiable instruments endorsed in blank. B sells them to C in violation of private orders from A. The sale is good.

[A person may be liable for the acts of another either because the latter has an actual or an apparent authority to act for him. "Loose expressions are to be found in the books as to the distinction between a special and a general agent. But all agents are more or less general, and all are more or less special. A more important distinction is between the actual and the ostensible authority of an agent. If the principal's representations or acts give to the agent the appearance of an authority larger than the agent actually possesses, the principal may be bound by such of the agent's acts as, although beyond the line of the agent's actual authority, are still within the margin of his ostensible or apparent authority." This rule proceeds "on the established and elementary principle, that untrue representations, on the faith of which a man induces a third person to act, bind the party making them" (a). A principal's liability under this section generally arises from the employment of a general agent, the nature and extent of whose authority is well recognized. A factor or agent for sale of goods is generally held out by his principal as authorized to sell with-

(a) Byles on Bills, 31.



out any particular limit of price ; but if it be notorious that such a limit is usually fixed, the principal would not be bound by a sale below such limit (a). The agent appointed for some particular purpose, cannot bind his principal by contracts exceeding his authority, because he rarely has any apparent authority, and, therefore, third persons must trust to his actual authority : but if the principal has been in the habit of ratifying his agent's unauthorized acts, he will have induced persons to believe that such acts are within the scope of the agent's authority, and the agent's acts will, accordingly, be binding upon him. Thus, a servant generally has no apparent authority to pledge his master's credit, but if such authority is given in some instances, and the servant afterwards buys goods which he is not authorized to buy, his master will be liable for the price, because he has given his servant an apparent authority to pledge his credit.

It has been suggested that mere knowledge on the part of a principal that other persons are acting on unauthorized representations of his agent is sufficient to estop him from denying the agent's authority. Thus, in *Ramsden v. Dyson* (b), the Lord Chancellor observed: " If, indeed, the principal knows that persons dealing with his agent have so dealt in consequence of their believing that all statements made by him had been warranted by the principal, and, knowing this, allows the persons so dealing to expend money in the belief that the agent had an authority, which in fact he had not, it may be that in such a case a Court of Equity would not allow the principal afterwards to set up want of authority in the agent."]

238. Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals ; but misrepresentations made, or

Effect, on agreement, of misrepresentation or fraud by agent.

(a) *Baines v. Ewing*, L. R., 1 Ex., 320.

(b) L. R., 1 H. L., at p. 153.

frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Illustrations.

(a.) A, being B's agent for the sale of goods, induces C to buy them by a misrepresentation, which he was not authorized by B to make. The contract is voidable, as between B and C, at the option of C.

(b.) A, the Captain of B's ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B and the pretended consignor.

[This section places misrepresentations or frauds of the agent on the same footing as misrepresentations or frauds of the principal as regards their effect in rendering the contract voidable. The only question is, whether the fraud or misrepresentation was made by the agent while acting within the scope of his authority.

"With respect to the question," said the Court of Exchequer Chamber, "whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods. . . . In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in" (a). The rule thus laid down was adopted in a subsequent case by the Privy Council (b), and it is there also stated that the judgment of the Exchequer Chamber and that of the House of Lords in a case decided just at the same time (c) are not, as would at first sight appear,

(a) *Barwick v. English Joint Stock Bank*, L. R., 2 Ex., at p. 265.

(b) *Mackay v. Commercial Bank of New Brunswick*, L. R., 5 P. C., at p. 411.

(c) *Western Bank of Scotland v. Addie*, L. R., 1 Sc. App., 145.

irreconcilable, because the latter judgment really turned upon a point which did not arise before the Exchequer Chamber. An agent acting in the course of his employer's business is completely identified with his employer, and therefore, if the person with whom he deals is deceived, it matters not that no moral fraud is attributable to the employer—the person dealing with his agent having been deceived is entitled to relief or to recover from the principal the profit derived from the fraud (a). It is not enough to show that the agent was put in a position to deceive strangers: it must also appear that the act complained of was part of his employment and done for his principal's benefit. Thus, in the case on which Illustration (b) is founded, it was held that the owner of a ship was not responsible for the conduct of the master in signing bills of lading for goods which had not been shipped (b). Subsequently, it was held that a wharfinger was not responsible for the issue by his servant of fictitious warrants, purporting that goods were in store, when they were not (c).

In a late case it was sought to render directors of a company personally liable for fraudulent statements in a prospectus issued by brokers who were endeavouring to place debentures of the company and thus raise money for the use of the company. It would appear that the directors had lent money to the company, and they were authorized by a general meeting to issue debentures. They accordingly empowered the secretary of the company to employ these brokers. The Court held that the brokers were the agents of the company and not of the directors, they being intervening agents, and that the repayment to them of their loans to the company out of the funds raised by the issue of their debentures, though in some sense consequent upon, had no necessary connection with, the fraudulent statements in the prospectus. The Court further considered that the directors were not the principals of the brokers so as to bring the former within the rule that the principal is answerable where he has

(a) *Fuller v. Wilson*, 3 Q. B., 58; Sugd., V. & P., 249; Benj., 349; *Mackay v. Commercial Bank*, L. R., 5 P. C., 394.

(b) *Grant v. Norway*, 10 C. B., 665.

(c) *Coleman v. Riches*, 16 C. B., 104.

received a benefit from the fraud of an agent acting within the scope of his authority (a).]

CHAPTER XI.

OF PARTNERSHIP.

239. 'Partnership' is the relation which subsists between persons who have agreed to combine their property, labor, or skill in some business, and to share the profits thereof between them.

Persons who have entered into partnership with one another are called collectively a 'firm' defined. 'firm.'

Illustrations.

(a.) A and B buy 100 bales of cotton, which they agree to sell for their joint account. A and B are partners in respect of such cotton.

(b.) A and B buy 100 bales of cotton, agreeing to share it between them. A and B are not partners.

(c.) A agrees with B, a goldsmith, to buy and furnish gold to B, to be worked up by him and sold, and that they shall share in the resulting profit or loss. A and B are partners.

(d.) A and B agree to work together as carpenters, but that A shall receive all profits, and shall pay wages to B. A and B are not partners.

(e.) A and B are joint owners of a ship. This circumstance does not make them partners.

[In order to constitute a partnership, there must be an agreement between two or more persons to combine their property, labor or skill in some business, and to participate in the profits arising from such business. The agreement may relate to some particular transaction or adventure only, as, for instance, where solicitors, who are not partners, jointly undertake some particular case and agree to share the profits. Their rights and liabilities are then governed by the law of partnership as to that particular

(a) *Weir v. Barnett*, L. R., 3 Ex. D., 32.

transaction. So, where several persons join in the purchase of goods with a view to re-sale, a partnership is created (a).

Mere combination or co-ownership does not make a partnership. The members of a committee of a club are not agents for each other, or for the members of the club, so as to make them liable for goods supplied upon credit, unless it is shown that the dealing on credit was in furtherance of the common object of the club, or that the persons sought to be charged were privy to the contract (b). In a case (c) similar to that stated in Illustration (b), the agreement was that one person should purchase oil and then divide it amongst himself and others, they paying him their proportion of the price. On the purchaser becoming bankrupt, the seller sought to make the others liable for the price; but it was held that the purchaser had bought as a principal, and not as an agent for the others, and that there was no partnership between him and them in respect of which they could be made liable. In this case there was a combination of property without an agreement to share profits, and, consequently, no partnership.

On the other hand, an agreement to participate in profits does not of itself create partnership, or afford conclusive evidence of it. The leading case on this point is *Cox v. Hickman* (d), where certain traders, being in difficulties, assigned all their property to trustees, upon trust, amongst other things, to carry on their business and to pay and divide the nett income thereof among their creditors, the said income to be deemed, nevertheless, to be the joint property of the traders. The deed was executed by Cox as creditor and as trustee; but he, in fact, did not act as trustee in carrying on the business, which was managed by others of the trustees. In the course of the business, goods were ordered of Hickman, and the bills which he drew in respect of them were signed by one of the acting trustees. The question was whether Cox could be made liable upon them. The House of Lords, reversing the original decision, held that Cox was not liable, the *ratio decidendi* being, that the trade was not carried on

(a) *Reid v. Hollinshead*, 4 B. & C., 867.

(b) *Flemyng v. Hector*, 2 M. & W., 172; *Todd v. Emly*, 7 M. & W., 427.

(c) *Coope v. Eyre*, 1 H. Bl., 37.

(d) 8 H. L. C., 268.

by persons acting on his behalf. "It was argued," said Lord Cranworth, "that, as they (the creditors) would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner, is nevertheless, in contemplation of law, a partner, is, whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test: for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his own behalf. When that is the case, he is liable to the trade-obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the trade-debts. The correct mode of stating the proposition is to say that the same thing which entitles him to the one, makes him liable to the other, *viz.*, the fact that the trade has been carried on on his behalf, *i. e.*, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liabilities have been incurred, and under whose management the profits have been made" (a).

In accordance with this decision it has since been held in various cases, that one who is not ostensibly a partner can be made liable for the contracts of another only when that other has been authorized to act as agent for him; and that the question whether the relation of principal and agent exists, depends upon all the circumstances of the case, and not upon the mere fact that the business is carried on, more or less, for the benefit of the person sought to be made liable. In *Bullen v. Sharp* (b), all the profits of a son's business were assigned over to his father and another person, upon trust, first, to pay the father £500 a year, to be increased to a sum equal to one-fourth of the profits when one-fourth thereof amounted to more than £500 a year; and, secondly, to pay the residue over to the son. The father had also power to act for the son in the business. It was held that the father was not responsible for the son's engagements, because the

(a) 8 H. L. C., at p. 306.

(b) L. R., 1 C. P., 86.

business was that of the son, and he had neither ostensibly nor in reality any authority to bind his father. So also in *Redpath v. Wigg* (a) and *Easterbrook v. Barker* (b), a debtor had assigned his property to trustees, and carried on his trade under their control and for the benefit of his creditors so long as a certain composition should remain unpaid. It was held that the liability of the trustees for obligations incurred by the debtor depended upon the question, whether it was the intention of the parties that the business should be carried on as that of the trustees or as that of the debtors; in other words, "whether the trustees were the masters or principals and the debtor their servant or agent, or whether the debtor was master and the trustees only inspectors and controllers." In these cases the intention of the parties appeared from the terms of the trust-deeds, and their relations were determined by the Court in accordance with them. The same principle was applied by the High Court of Bengal and by the Privy Council in the case of *Mollwo, March & Co. v. The Court of Wards* (c), in which case the creditor of a firm consented to continue his advances to it, in consideration, amongst other things, of an assignment to him of the property of the firm and an agreement to pay a commission on their profits and to allow him a certain control over their business. Act XV of 1866 (now repealed by this Act) was admitted to be inapplicable, and the case was decided upon the principles of English law. The Court said that the question what relation existed between the parties, depended on the real intention and contract of the parties, and that their true relation so determined was that of creditor and debtor. "A partnership was not contemplated, and the agreement is really founded on the assumption, not of community of benefit, but of opposition of interests. It may well be that, where there is an agreement to share the profits of a trade, and no more, a contract of partnership may be inferred, because there is nothing to show that any other was contemplated; but that is not the present case, where another and different contract is shown to have been intended, *viz.*, one of loan and security."

(a) L. R., 1 Ex., 335.

(b) L. R., 6 C. P., 1.

(c) 3 B. L. R., A. C., 238; 10 *ib.*, at p. 321; L. R., 4 P. C., 419.

Where the Court is satisfied that the agreement is colorable, and that the relation of principal and agent does in fact exist, the liability will be enforced. "If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward as ostensible traders others who are really their agents, they must not hope by such devices to escape liability; for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character" (a). And again, "it may be said that, if this reasoning is right, a man might bargain to receive all the profits of a business, and not be liable. The answer is, the thing is impossible. There never was, and never will be, a *bond fide* agreement by one man to carry on a business, bear all its losses, and pay over all its profits" (b).

The result of the cases is, that the question whether a person can be sued for contracts entered into by another, always resolves itself into a question of agency; for that is the foundation of a partner's liability. A dormant partner is liable just in the same manner, and for the same reasons, as an unknown principal.

Ostensible partners, in contradistinction to dormant partners, are dealt with in Sections 245 and 246.]

240. A loan to a person engaged or about to engage in any trade or undertaking,

Lender not a partner by advancing money for share of profits.

upon a contract with such person that the lender shall receive interest at a rate varying with the profits, or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible as such.

[The propositions contained in this and the four following sections might, with equal propriety, be treated as Illustrations of Section 239, and as exhibiting relations which do not constitute real partnerships. The Statute (28 & 29 Vic., c. 86) on which they are founded, was passed under a misapprehension as to the

(a) 10 B. L. R., at p. 323.

(b) Bullen v. Sharp, per Bramwell, B. L. R., 1 C. P., at p. 126.

true state of the law, and cases have been decided independently of that Statute, and of the corresponding Act, XV of 1866, in the same way as they would have been decided under those enactments (a). This section dispenses with the necessity of the contract between the lender and the trader being in writing, which was imposed by the repealed Act XV of 1866.]

241. In the absence of any contract to the contrary, property left by a retiring partner, or the representative of a deceased partner, to be used in the business, is to be considered a loan within the meaning of the last preceding section.

Property left in business by retiring partner, or deceased partner's representative.

[This section is merely an application of the rule laid down in the preceding section. The only material difference between this and the corresponding section of the repealed Act is the non-requirement of a contract in writing.

The terms of the other sections are identical with those of the corresponding sections, as well in the repealed Act as in the Statute.]

242. No contract for the remuneration of a servant or agent of any person, engaged in any trade or undertaking, by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

Servant or agent remunerated by share of profits, not a partner.

243. No person, being a widow or child of a deceased partner of a trader, and receiving, by way of annuity, a proportion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of such trader, or be subject to any liabilities incurred by him.

Widow or child of deceased partner receiving annuity out of profits, not a partner.

(a) *Bullen v. Sharp*, L. R., 1 C. P., 86; *Mollwo, March & Co. v. Court of Wards*, 10 B. L. R., at pp. 321, 322.

244. No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the good-will of such business, shall, by reason only of such receipt, be deemed to be a partner of the person carrying on such business, or be subject to his liabilities.

Person receiving portion of profits for sale of good-will, not a partner.

245. A person who has, by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm.

Responsibility of person leading another to believe him a partner.

[This and the following section deal with "ostensible" partners, and the questions involved in them are really matters of evidence, and, as such, are governed by the 115th Section of the Indian Evidence Act, which precludes a man from denying the truth of that which he has, by his act or declaration, so led others to believe as to act upon their belief. A man's real relation to a firm is immaterial; if he has induced others to give credit to the firm by the fact of his holding himself out as a partner, he is estopped from denying his liability. "A case may be stated, in which it is the clear sense of the parties to the contract that they shall not be partners; that A is to contribute neither labor nor money, and, to go still farther, not to receive any profits. But if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy" (a). Of course it must be shown that the act relied on as a profession of partnership took place before the contract was entered into, and that it was known to the person seeking to avail himself of it as having been instrumental in inducing him to make the contract. See note to next section.]

(a) *Waugh v. Carver*, 2 H. Bl., at p. 246.

246. Any one consenting to allow himself to be represented as a partner, is liable, as such, to third persons who, on the faith thereof, give credit to the partnership.

Liability of person permitting himself to be represented as a partner.

[This section seems to refer more particularly to cases where a person who has retired still allows his name to be used in the designation of the firm. Such a person is generally liable as partner to a customer of the old firm, unless the customer has had notice of the dissolution, Section 264. If the retired partner has not actually permitted his name to be used, the mere fact of his knowing that it is used would probably be sufficient evidence either under this or the preceding section. Where, however, notice of dissolution was published in the Gazette, and sent round to the customers of the firm, and one of the partners carried on business under the old firm, it was held that the other partners were not bound to apply for an injunction against his doing so, and were not liable on bills accepted by him in the hands of a person ignorant of the dissolution (*a*).

The general rule in the English Courts is, that a mere notice of dissolution in the Gazette is enough to exempt the out-going partner from liability to all who had no dealings with the partnership; but that the partners remain liable to customers of the house, until they have received particular notice of the dissolution (*b*). See, however, Section 264 and note.

An injunction will be granted to restrain a person from holding out another as his partner without the authority of that other (*c*). Under this section would also come cases where a person permits himself to be referred to as a partner, but does not wish to have his name disclosed (*d*). Authority to make representations is a matter of fact, which may be inferred from a variety of circumstances, such as a person's allowing his name to be put to a prospectus or other such document (*e*).

(*a*) *Newsome v. Coles*, 2 Camp., 617.

(*b*) *Id.*, note at p 620.

(*c*) *Routh v. Webster*, 10 Beav., 561.

(*d*) *Martyn v. Gray*, 14 C. B., N. S., 824.

(*e*) *Collingwood v. Berkeley*, 15 *id.*, 145.

The principle upon which a man who is not in reality a partner may be held liable as such under this or the preceding section, is the same as that on which a person may be held liable for the unauthorized acts of an apparent agent, Section 237. See also Sections 109 and 115 of the Indian Evidence Act.]

247. A person who is under the age of majority according to the law to which he is subject, may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm ; but the share of such minor in the property of the firm is liable for the obligations of the firm.

Minor partner
not personally
liable, but his
share is.

[The first part of this section is in accordance with the rule of English law that an infant cannot bind himself by contract, and that he has, on coming of age, an option to disaffirm the contract (a). He cannot partially disaffirm it. For instance, he cannot insist that, in taking partnership-accounts, he shall be credited with profits and not be debited with losses. Nor can he, on coming of age, repudiate the contract and at the same time recover any money he may have paid under it (b). So, an infant-shareholder must either repudiate his shares or pay calls on them (c).

The effect, however, of the last proposition in the section is to extend an infant's liability beyond the limits assigned to it in English Courts : for it has there been held that, if the infant avoids the contract, and if he has obtained no benefit under it, he is entitled to recover back the portion which he has contributed (d). This section has the effect of making the infant's share in the firm's property liable for its obligations, whether he has derived benefit from them or not. The rule, however, does not affect the minor's liability with regard to his general property. The result of this and the following section is to constitute a difference between a minor's position in partnership and in

(a) *Newry Railway Company v. Coombe*, 3 Ex., 565.

(b) *Holmes v. Blogg*, 8 Taunt., 508.

(c) *Cork & Bandon Ry. Co. v. Cazenove*, 10 Q. B., 935.

(d) *Corpe v. Overton*, 10 Bing., 253.

other contracts. In other cases the agreement is void during minority and cannot be enforced, though, of course, a new valid contract may be made upon his coming of age. In partnerships, on the contrary—(1) the minor can share profits; (2) his share in the firm's property is liable for its obligations, but he is not personally liable; (3) if, on majority, he does not repudiate the partnership, he becomes liable for all debts incurred by it since his admission. See also note to next section. The personal irresponsibility of an infant-partner is simply a consequence of his general incapacity to contract, and it is not affected by the ignorance of those who deal with him. It does not appear that, under the present Act, his estate would be liable, even if he fraudulently represented himself to be of age: though an infant's liability is enforced in such cases in the Court of Chancery (a).

According to the English cases, an infant may repudiate the contract and recover back his contribution at any time before he has derived any advantage (b) from the performance of the contract, but not afterwards, and this rule is in accordance with the general principle, that a person cannot avoid a contract if he cannot restore the other party to the same position as if no contract had been entered into (c). The privilege of repudiation, enjoyed by the minor under this Act, is not expressly fettered with any such condition; though he would, under the provisions of Section 64, be bound, on avoiding the contract, to restore, *so far as may be*, any benefit received under it. See note to Section 64. The position given to a minor partner under this and the following section is an important modification of the rule implied in Chapter II, that agreements with minors are *ab initio* void.]

248. A person who has been admitted to the benefits of partnership under the age of majority, becomes, on attaining that age, liable for all obligations incurred

Liability of minor partner on attaining majority.

(a) *Ex parte Watson*, 16 Ves., 265.

(b) *Corpe v. Overton*, 10 Bing., 253; *Wilson's case*, L. R., 8 Eq., 240.

(c) *Corpe v. Overton*, 10 Bing., at p. 256.

by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership.

[It seems, according to English law, that if a partner, on coming of age, neither affirms nor disaffirms the partnership, he will be held liable only for debts incurred by the firm subsequently to that time (a). Under the present Act, if he expresses his determination to repudiate the partnership publicly and unequivocally, his liability will be limited to the amount of his contribution: but, if he fail to do so, he will become liable for all firm-debts incurred since his admission to the partnership: see notes to Sections 245 and 246. His position will then be the same as if he had ratified the original agreement: see Sections 196, &c., and notes as to ratification.]

249. Every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership; but a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firm for anything done before he became a partner.

[A person does not, by entering a firm, become liable for its then existing debts, for although, as between the partners, the partnership-accounts may be kept upon the footing of such a retrospective liability, such an arrangement will not enlarge the rights of third persons (b). The test is, what is the date of the contract on which it is sought to make a person liable as partner? Where, therefore, the contract was made before the person was a member of the firm, but the goods were delivered under it subsequently to his becoming a partner, he was held not to be liable (c). It might be said that his entry into the firm amounts to a rati-

(a) *Goode v. Harrison*, 5 B. & Ald., 147.

(b) *Vere v. Ashby*, 10 B. & C., 288; *Dickinson v. Valpy*, *ib.*, 142.

(c) *Whitehead v. Barron*, 2 Moo. & R., 248.

fication; but it must be remembered that no person can be rendered liable for an act done by another on the ground that he has ratified it, unless, at the time the act was done, it was done on his behalf (a). See Section 196 and note. Although an agreement between the incoming and the original partners, being *res inter alios acta*, cannot confer any right upon those who dealt with the original partners, so as to fix the incoming partner with liability, yet he may bind himself by a fresh agreement between himself and such third persons to undertake such liability; the obligation then arises, not out of the fact of his becoming a partner, but out of this new agreement (b).]

250. Every partner is liable to make compensation to third persons in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.

Partner's liability to third person for neglect or fraud of co-partner.

[The liability imposed by this section follows from the circumstance of each partner being the agent of the firm, and it is limited in the same manner as is that of a principal for the acts of his agent. The neglect or fraud complained of must have been committed in the ordinary course of the partnership-business. Thus, a firm of coach-proprietors have been held liable for the negligent driving of a coach by one of the members (c). A firm would not be liable if one of the members maliciously prosecuted a person for stealing partnership-property, for the loss so occasioned could not be ascribed to neglect or fraud in the management of the business (d); nor indeed do the terms of the section include any act of wilful wrong except fraud.

In respect of the fraud of one partner, his co-partners are responsible, provided it be committed while he is acting within the scope of his authority; and the fact of their complete innocence and non-participation in the fruits of the fraud is irrelevant. Thus, a firm of Solicitors is liable if one of the

(a) *Young v. Hunter*, 4 Taunt., 581.

(b) *Rolfe v. Flower*, L. R., 1 P. C., 27.

(c) *Moreton v. Hardern*, 4 B. & C., 223.

(d) *Arbuckle v. Taylor*, 3 Dow., 160.

members misapplies money received by him from a client to invest on mortgage, or for the purpose of making arrangements with the client's creditors (a). The firm's responsibility is still clearer if one of the members misapplies money held by the firm for others and not received by him personally. A good illustration is afforded by the case of *Stone v. Marsh* (b), where the defendants were bankers, whose business it was to sell stock and receive the proceeds of the sales for their customers. Fauntleroy, one of the partners, forged powers-of-attorney for the sale of stock belonging to customers of the bank, and the proceeds of the sale were remitted to the plaintiffs, with whom the defendants had an account, and there placed to the credit of the defendants. Fauntleroy then drew out these moneys by a cheque signed in the firm's name and applied them to his own use. The defendants' firm was held liable, because the money was received in the usual way, and if they did not know of its receipt, they might have known it had they used ordinary diligence. The decision would, it seems, have been different, if the money not been thus in the custody of the firm. On the other hand, if the transaction is unconnected with the firm's business, or if the fraud is committed while the partner is not acting as a member of the firm, the loss occasioned cannot be thrown upon the innocent members of the firm. Thus, if one partner by fraud induces a person to join the firm, such fraud cannot be imputed to the firm, unless he had authority to find another partner (c).]

251. Each partner who does any act necessary for, or usually done in, carrying on the business of such a partnership as that of which he is a member, binds his co-partners to the same extent as if he were their agent duly appointed for that purpose (1).

Exception.—If it has been agreed between the partners that any restriction shall be placed upon

Partner's power
to bind co-part-
ners.

(a) *Atkinson v. Mackreth*, L. R., 2 Eq., 570; *St. Aubyn v. Smart*, L. R., 3 Ch., 646.

(b) 6 B. & C., 551.

(c) *Lindley on Partnership*, 332; *Lovell v. Hicks*, 2 Y. & C., Ex., 46.

the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement (2).

Illustrations.

(a.) A and B trade in partnership; A residing in England, and B in India. A draws a bill of exchange in the name of the firm. B has no notice of the bill, nor is he at all interested in the transaction. The firm is liable on the bill, provided the holder did not know of the circumstances under which the bill was drawn.

(b.) A, being one of a firm of solicitors and attorneys, draws a bill of exchange in the name of the firm without authority. The other partners are not liable on the bill.

(c.) A and B carry on business in partnership as bankers. A sum of money is received by A on behalf of the firm. A does not inform B of such receipt, and afterwards A appropriates the money to his own use. The partnership is liable to make good the money.

(d.) A and B are partners. A, with the intention of cheating B, goes to a shop and purchases articles on behalf of the firm, such as might be used in the ordinary course of the partnership-business, and converts them to his own separate use, there being no collusion between him and the seller. The firm is liable for the price of the goods.

[(1) A person can be liable on a contract only because he has made himself a party to it, or because he has in some way authorized another to act for him. Whether he is sued as principal or as partner, the question is the same—namely, was the person acting for him, acting within the limits of his authority? The test is, whether the act is necessary or usual in the particular business, and that depends upon the nature of the business. One general rule as to what is necessary or usual in partnership-businesses is pointed out in Illustrations (a) and (b), *viz.*, that, in the case of ordinary trading partnerships, the law implies an authority to draw and accept bills, but in other partnerships, such as in the case of solicitors, the party seeking to make the firm liable must prove express authority (a). In the case of an ordinary contract reduced into writing, persons who are not parties and have not signed the written document, may be sued as undisclosed

(a) *Forster v. Mackreth*, L. R., 2 Ex., at p. 166; *Dickinson v. Valpy*, 10 B. & C., 128; *Fisher v. Tayler*, 2 Hare, 218.

principals or dormant partners (a), but the law makes an exception in the case of bills of exchange. In *Nicholson v. Ricketts* (b), two firms, of which the defendants formed one, carried on joint exchange-operations, each drawing bills on the other and sharing the profit or loss. The action was brought against the defendant's firm for a breach of contract to accept bills drawn on them by the other firm in their own name and purchased by the plaintiffs. It was held that the plaintiffs could not recover, because, though there might be a partnership between defendants and the other firm, yet there was no evidence that the latter firm had authority to bind the defendants on bills drawn in their own name; there was no common partnership-name, and nothing to show that the name of one firm was intended to include the other. The same point was raised on very similar facts in a recent case (c), where four firms traded together, using among themselves a common name, and each drew on the other in its own name. Lord Justice Mellish said, that the case was the same as that put by Crompton, J., in *Nicholson v. Ricketts*: "Where A, B and C are in partnership, and arrange that C shall draw bills in his own name on A and B, I think it is impossible to say that C's signature to such bills binds the others."

It is not within the scope of a trade-partner's authority to open a banking account on behalf of his firm in his own name (d). Such contracts must be entered into in the name of the firm or they will not bind it. The firm, therefore, cannot be made liable on account of a bill of exchange drawn in the name of one member even though it may have received the proceeds (e).

Each partner has authority to receive money due to the firm and to give valid receipts (f): but the settlement of a debt, otherwise than by a money-payment, does not necessarily bind his partners. One partner cannot, any more than an ordinary agent, compromise a debt, or set-off against it a debt due from

(a) *Ad. on Cont.*, 652; *Beckham v. Drake*, 9 M. & W., 79; Note, Sec. 230.

(b) 29 L. J., Q. B., 55.

(c) *In re Adanson Fibre Co.*, L. R., 9 Ch., at p. 644.

(d) *Alliance Bank v. Kearsley*, L. R., 6 C. P., 433.

(e) *Emly v. Lye*, 15 East, 7.

(f) *Lindley on Partnership*, 288, 289; *Hawkshaw v. Parkins*, 2 Swanst., 546; *Henderson v. Wild*, 2 Camp., 560.

himself (a). One partner may sue in the name of all, or defend an action brought against all the partners (b). In one case it was held that an agreement to stay proceedings, entered into by two partners, bound the third partner, who had originally instituted the proceedings without the knowledge of the others (c). On the other hand, it has been held that one partner cannot bind the firm by an agreement to refer matters to arbitration, or by consenting to judgment (d).

It is not in the course of a firm's ordinary business to contract for the lease of a house, or to make a mortgage of partnership-property, and one partner cannot, therefore, in respect of such transactions, bind the rest (e). In partnerships, however, where authority to borrow money exists, there is also authority to pledge the firm's personal property (f).

(2) Notice becomes material only when the firm seeks to escape liability for some act done by one of the members with apparent, but without real, authority. The terms in which the Exception is expressed are rather wider than would be warranted by English law. For it seems that there is no decided case, that persons "who are aware of the terms upon which partners have agreed together to carry on business, are deemed to contract with them upon the basis of the agreement come to amongst the partners themselves" (g). Payment of a partnership-debt by any one partner discharges the other partners, if the object of the partner paying was to extinguish the whole debt, or if he made the payment out of the partnership-funds (h). But if a firm is unable to pay a debt, and one partner out of his own monies pays it, but in such a way as to show an intention to keep the debt alive against the firm for his own benefit, this payment by him will be no answer to

(a) *Young v. White*, 7 Beav., 506.

(b) *Whitehead v. Hughes*, 2 Crom. & M., 318.

(c) *Lindley on Partnership*, 297; *Harwood v. Edwards*, *Gow on Part.*, 65, note.

(d) *Hatton v. Royle*, 3 H. & N., 500; *Hambidge v. De la Crouée*, 3 C. B., 742.

(e) *Sharp v. Milligan*, 22 Beav., 606; *Juggeewun-das Keeka Shah v. Ramdas Brijbookun-das*, 2 M. I. A., 487.

(f) *Reid v. Hollinshead*, 4 B. & C., 867.

(g) *Lindley on Partnership*, 350.

(h) *Watters v. Smith*, 2 B. & Ad., at p. 893; *Thorne v. Smith*, 10 C. B. 659.

an action brought against the firm by the creditor suing on behalf of the partner who made the payment (a).]

252. Where partners have by contract regulated and defined, as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of all them, which consent must either be expressed or be implied from a uniform course of dealing.

Annulment of contract defining partners' rights and obligations.

Illustration.

A, B and C, intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the nett profits arising from the partnership-business shall be equally divided between them. Afterwards they carry on the partnership-business for many years, A receiving one-half of the nett profits, and the other half being divided equally between B and C. All parties know of and acquiesce in this arrangement. This course of dealing supersedes the provision in the articles as to the division of profits.

[This rule is clearly expressed by Lord Eldon in the following passage: "In ordinary partnerships nothing is more clear than this, that although partners enter into a written agreement, stating the terms upon which the joint concern is to be carried on, yet, if there be a long course of dealing, or a course of dealing, not long, but still so long as to demonstrate that they have all agreed to change the terms of the original written agreement, they may be held to have changed those terms by conduct. For instance, if in a common partnership the parties agree that no one of them shall draw or accept a bill of exchange in his own name without the concurrence of all the others, yet, if they afterwards slide into a habit of permitting one of them to draw or accept bills without the concurrence of the others, this Court will hold that they have varied the terms of the original agreement in that respect" (b).

This section requires the consent of all the partners ; but with regard to ordinary matters connected with the business, and not

(a) *M'Intyre v. Miller*, 13 M. & W., 725.

(b) *Const v. Harris*, 1 T. & R., at p. 523.

therefore affecting their rights and obligations under the contract, the decision of a majority is binding ; see Section 253, (5).]

Rules determining partners' mutual relations, where no contract to contrary.

253. In the absence of any contract to the contrary, the relations of partners to each other are determined by the following rules:—

- (1.) All partners are joint owners of all property originally brought into the partnership-stock, or bought with money belonging to the partnership, or acquired for purposes of the partnership-business. All such property is called partnership-property. The share of each partner in the partnership-property is the value of his original contribution, increased or diminished by his share of profit or loss (1):
- (2.) All partners are entitled to share equally in the profits of the partnership-business, and must contribute equally towards the losses sustained by the partnership:
- (3.) Each partner has a right to take part in the management of the partnership-business (2):
- (4.) Each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business:
- (5.) When differences arise as to ordinary matters connected with the partnership-business, the decision shall be according to the opinion of the majority of the

partners; but no change in the nature of the business of the partnership can be made, except with the consent of all the partners (3):

- (6.) No person can introduce a new partner into a firm without the consent of all the partners:
- (7.) If, from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members:
- (8.) Unless the partnership has been entered into for a fixed term, any partner may retire from it at any time:
- (9.) Where a partnership has been entered into for a fixed term, no partner can, during such term, retire, except with the consent of all the partners, nor can he be expelled by his partners for any cause whatever, except by order of Court:
- (10.) Partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner (4).

[(1) The mercantile notion of a firm regards it as having obligations and rights distinct from those of the members composing it, and thus, in their accounts, partners are treated as creditors to the firm for the amount of their contributions and for equal shares of the profits, and, on the other hand, debtors to the firm for all they draw out of it and for their share of its deficiencies; but this notion does not affect the legal rights of partners between themselves, or towards third parties, which do not differ from those of any other joint promisors.

The general rule is, that there is equality in division of profits and losses, but the capital, or so much of it as has not been

applied to the liquidation of debts, is divided according to the proportions in which it was contributed. Losses are paid first out of profits, next out of capital, and lastly, by recourse to the partners individually. The following rules are given by Lindley for the application of assets.

The assets should be applied as follows :—

- (i.) In paying the debts and liabilities of the firm to non-partners ;
- (ii.) In paying to each partner, rateably, what is due from the firm to him for advances as distinguished from capital ;
- (iii.) In paying to each partner, rateably, what is due from the firm to him in respect of capital ;
- (iv.) The ultimate residue, if any, will then be divisible as profit between the partners in equal shares, unless the contrary can be shown (a).

Thus, A and B went into partnership without written articles, the parol agreement between them being that profits and losses should be shared equally. A died, and it was found that he had advanced more capital than B, to the extent of £1,900. The nett assets were only £1,400. It was held that the deficiency of £500 was a debt to which the estates of both partners were liable to contribute equally (b).

If, after payment of the debts, the assets are not sufficient to replace the capitals of both partners, they must be applied first in repaying the one who has brought in additional capital, and the residue must be divided between them in proportion to their capitals (c).

(2) It is the duty of every partner to keep accounts of the business, and the right of every partner to inspect the firm's accounts: a suit for account, with a right to discovery, is the remedy for one who wishes to enforce this obligation against his co-partners. The Court will restrain partners from preventing a co-partner from transacting the business of the firm.

See cases cited in note to Section 259.

(a) Lindley on Partnership, 827.

(b) *Nowell v. Nowell*, L. R., 7 Eq., 538.

(c) *Wood v. Scoles*, L. R., 1 Ch., 369.

(3) When partners are equally divided upon matters connected with the ordinary business, the rule in English Courts is that those who negative the change should prevail. Thus, one partner cannot dismiss an old, or engage a new, servant against the will of his co-partner (a). The majority must act with perfect good faith and every partner must be consulted; otherwise the Court will not give force to the decision of the majority.

The provision that nothing but the consent of all the partners can introduce a change in the nature of the partnership-business is really a branch of the rule expressed in Section 252. Even one dissentient partner cannot be bound by obligations which do not come within the terms of the contract into which he entered, nor can he be forced to retire from the firm; but he is entitled to have the concern carried on according to the original contract, until the partnership is in some way legally dissolved. "If six persons joined in a partnership of life-assurance," said Lord Eldon, "it seems clear that neither the majority, nor any select part of them, nor five out of the six, could engage that partnership in marine-insurances unless the contract of partnership expressly or impliedly gave that power: because, if this was otherwise, an individual or individuals, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent. . . . Courts must struggle to prevent particular members of those bodies from engaging other members in projects in which they have not consented to be engaged, or the engaging in which they have not encouraged, assented to, or empowered, or acquiesced in, expressly or tacitly, so as to make it not equitable that they should seek to restrain them. . . . They who seek to embark a partner in a business not originally part of the partnership-concern, must make out clearly that he did expressly or tacitly acquiesce" (b). The Court will restrain by injunction members of the partnership from transacting in the firm's name business which is not within the scope of the partnership.

(a) *Donaldson v. Williams*, 1 *Crom. & M.*, 345.

(b) *Natusch v. Irving, Gow on Part.*, App., 398; *Const v. Harris*, T. & R., at p. 525; *Attorney-General v. Great Northern Railway Co.*, 1 *Dr. & Sm.*, 154; *Ernest v. Nicholls*, 6 *H. L. C.*, 401.

(4) This last rule follows from the legal view of a firm, which regards only the partners composing it, and not the firm itself, as having a distinct existence; for, if dissolution did not ensue upon the death of a partner, the result would be the introduction of new partners into a firm without the consent of its members (a). See Section 254, (3). The representatives of a deceased partner have no right to succeed him in the firm, unless there is a distinct agreement to that effect.

The principle is thus enunciated by Lord Eldon: "The general rules of partnership are well settled. Where no term is expressly limited for its duration, and there is nothing in the contract to fix it, the partnership may be terminated at a moment's notice by either party. By that notice the partnership is dissolved to this extent, that the Court will compel the parties to act as partners in a partnership existing only for the purpose of winding-up the affairs. So death terminates a partnership, and notice is no more than notice of the fact that death has terminated it." (b).]

As a partnership, for the duration of which no term has been fixed, may be dissolved at any time, a decree for specific performance of an agreement to enter into such a partnership would be useless (c); and indeed it holds, as a general rule, that a Court will not decree specific performance of any agreement for a partnership (d).]

When Court
may dissolve
partnership.

254. At the suit of a partner the Court may dissolve the partnership in the following cases:—

- (1.) When a partner becomes of unsound mind (1):
- (2.) When a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors (2):
- (3.) When a partner, other than the partner suing, has done any act by which the

(a) *Crawshay v. Maule*, 1 Swanst., at p. 509.

(b) *Ib.*, at p. 508.

(c) Specific Relief Act, sec. 21 (d).

(d) *Cuddee v. Butter*, 1 W. & T. L. C., 875.

whole interest of such partner is legally transferred to a third person (3):

- (4.) When any partner becomes incapable of performing his part of the partnership-contract:
- (5.) When a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners (4):
- (6.) When the business of the partnership can only be carried on at a loss (5).

[(1) The intervention of the Court is necessary only when the partnership is for a fixed term: the Court will not, generally, grant any relief in suits between partners at will, unless there is also a prayer for dissolution (a).

According to the English decisions, the lunacy of a partner must be confirmed and incurable in order to induce the Court to grant a decree (b).

(2) According to English law, the bankruptcy of a partner of itself immediately dissolves a firm, whether it is of definite duration or not; because, the bankrupt's interest being transferred to his assignees, the result of the continued existence of the firm would be to introduce new members into it (c). Under this sub-section application to the Court is made necessary.

(3) It would be obviously unjust to allow a partnership for a definite term to be dissolved upon the transfer by one member of his interest to a third person, at the suit of the member so transferring his interest, because this would have the effect of giving any partner power to do indirectly what he could not do directly. The other partners, however, are entitled to make such transfer a ground for dissolution, because, otherwise, they would be forced into a partnership which they never contemplated. This sub-section seems to have the effect of modifying the opera-

(a) *G. Nágabhúshanam v. K. Gangayya*, 2 Mad. H. C., 28.

(b) *Kirby v. Carr*, 3 Y. & C., Ex., 184.

(c) *Crawshay v. Maule*, 1 Swanst., 507 n. (a).

tion of sub-section (7) of Section 253, at least when a partnership for a definite term is in question. In the case of partnerships at will, the transfer of one member's interest to another would, it is presumed, immediately dissolve the firm. Nice questions have arisen as to the rights of a transferee of a partner's interest, as to whether he is entitled to have an account, and other like points (a): for these the Act makes no provision. The fact of a partner suffering his share to be taken in execution of a decree would, of course, have the same effect as a voluntary assignment (b).

(4) The misconduct of the partner complained of must be either such as to exclude the partner suing from taking part in the concern, or of a nature to destroy the mutual confidence which should exist between persons who are to carry on a partnership-business. Thus, where one partner had become liable to a criminal prosecution by reason of his having been guilty of a fraudulent breach of trust, his co-partner was held to have a right to have the partnership dissolved (c). A man's own misconduct does not entitle him to a dissolution for the reasons stated in note (3).

When it appears that the object of a partner's misconduct is to drive his co-partners to a dissolution, the Court will restrain the misbehaving partner by injunction. Thus, where the defendant insisted on the dissolution of a partnership entered into with the plaintiff for a term of years, and entered into another partnership, which assumed the name of the old firm, the Court granted an injunction restraining him from carrying on trade except with the plaintiff until the expiration of the term (d).

(5) It is presumed that expectation of profit is contemplated in every partnership, and, therefore, even though it be entered into for a definite term, the Court will dissolve it, when it is shown that it cannot be carried on except at a loss. According to the English rule, it appears to be necessary also to show that the agreed amount of capital is exhausted. A partner cannot be compelled under such circumstance to bring in more capital (e).]

(a) *Lindley on Partnership*, 698, 950.

(b) *Johnson v Evans*, 7 M. & G., 240.

(c) *Essell v. Hayward*, 30 Beav., 158.

(d) *England v. Curling*, 8 Beav., 129.

(e) *Jennings v. Baddeley*, 3 Kay & J., 78.

Dissolution of
partnership by
prohibition of
business.

255. A partnership is in all cases dissolved by its business being prohibited by law.

[The business may become illegal, either by some legislative change, or by the happening of some event which makes it illegal for the members of the partnership to continue the business. The breaking out of war between two countries in which the partners respectively reside makes their trade illegal, and thus dissolves the firm. See Section 23, note (8).]

256. If a partnership entered into for a fixed term be continued after such term has expired, the rights and obligations of the partners will, in the absence of any agreement to the contrary, remain the same as they were at the expiration of the term, so far as such rights and obligations can be applied to a partnership dissolvable at the will of any partner.

Rights and obligations of partners in partnership continued after expiry of term for which it was entered into.

[By Section 109 of the Indian Evidence Act, the burden of proving that persons who are shown to have been acting as partners have ceased to stand in that relation to each other, is thrown on the person who affirms it; and by this section the further presumption is created, that the relations of such persons continue to be governed by the terms of the original contract which has expired, so far as they may be applicable to a partnership determinable at will. The same rule, with the same limitation, obtains in the case of a tenancy which is continued after the expiration of the term limited by the lease. In *Parsons v. Haywards* (a), the members of a firm continued the business after the period limited by the partnership-deed: it was held that the partnership could be dissolved only by special notice, and that, no notice having been given, it still existed on the original terms, and a decree was made for its dissolution on the footing of those terms.]

(a) 31 L. J., Ch., 670.

257. Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

General duties
of partners.

[This and the two following Sections state the rights and obligations which form the necessary foundation of the partnership-contract. The non-observance of them may amount to misconduct within the meaning of Section 254, (5), or remedy may be sought by the process of a suit for account, or by injunction.

An injunction to restrain a partner from a breach of one of the duties imposed by this Section will not, in general, be granted where the partnership is at will, and where there is no prayer for dissolution. In *Hall v. Hall* (a), the partnership was for twenty-one years, determinable at 12 months' notice, and, upon complaint that the plaintiff had been excluded by the defendant from the partnership-business, an injunction was granted restraining the defendant from applying the partnership-mones otherwise than in the ordinary course of business, and from obstructing the plaintiff in the exercise of his rights under the contract. The right to apply to the Court for relief may be lost by the conduct of the party applying; for "it is a principle of this Court with respect to partnership-concerns, that a partner who complains that the other partners do not do their duty towards him, must be ready at all times, and offer himself, to do his duty towards them" (b). A breach of the duty imposed by the following Section will entitle a partner to a decree for an account, although there is no prayer for dissolution, and no term fixed for the duration of the partnership.]

Account, to
firm, of benefit
derived from
transaction
affecting part-
nership.

258. A partner must account to the firm for any benefit derived from a transaction affecting the partnership.

(a) 12 Beav., 414.

(b) *Const v. Harris, T. & R.*, at p. 524.

Illustrations.

(a.) A, B and C are partners in trade. C, without the knowledge of A and B, obtains for his own sole benefit a lease of the house in which the partnership-business is carried on. A and B are entitled to participate, if they please, in the benefit of the lease.

(b.) A, B and C carry on business together in partnership as merchants trading between Bombay and London. D, a merchant in London, to whom they make their consignments, secretly allows C a share of the commission which he receives upon such consignments, in consideration of C's using his influence to obtain the consignments for him. C is liable to account to the firm for the money so received by him.

[This and the following Section seem to have been intended as explanatory of the preceding one; but the proposition here stated is expressed with more latitude than is justified by principle or by the cases cited as Illustrations. If the firm be fully acquainted with the fact of their partners' dealings, and with the nature of those dealings, there seems to be no reason why he should be bound to account for any benefit derived from them. The Court of Chancery, in dealing with the relations of partners, or of principals and their agents, which stand upon the same footing, has never denied to a partner or an agent the liberty of dealing with his co-partners or principal, but has laid down, as a rule, that if he does so deal, it is incumbent upon him to show that the dealing has been fair and honest, and that all the information of which he has been himself possessed has been furnished to the co-partners or the principal, as the case may be.

In cases where one partner has improperly obtained for himself a benefit from transactions affecting the partnership, a suit is maintainable against him, although no dissolution is prayed. Thus, where one partner, being employed to purchase goods for the firm, supplied the firm at market-price with goods which he had previously bought at a lower price, and so made considerable profits, it was held that he must account to the firm for the profit thus made (a). When the personal interests of a partner and his duty to his co-partners conflict, the Court will not allow the transaction to stand. On the same principle, the director of a company, who is also member of a firm which deals with the

(a) *Bentley v. Craven*, 18 Beav., 75; See Reporter's note, 2 Mad. H. C., 31.

company, cannot retain his seat; but the contract is not avoided (a). It is not only contrary to a partner's duty to obtain an advantage at the expense of his co-partners, but it is also his duty to secure to the firm benefits which it is in his power to obtain at all. Thus he will not be allowed to keep to himself benefits which he gains by his connection with the firm, or by the use of partnership-property. Where one partner makes profits out of the use of the partnership-property, he is accountable for such profits: thus, the master, being also part-owner of a ship which was employed for the common benefit of the owners, was held to have no right to employ her in a private speculation for his own benefit; and the Court declined to recognize any custom excluding the other partners from the enjoyment of the profits so made (b). In the case on which Illustration (a) is founded, two partners, having obtained in their own names a lease of the partnership-premises, dissolved the partnership, and sought to exclude the plaintiff, another partner, from all interest in the new lease. In taking the accounts of the partnership, the Court held that the new lease should be treated as part of the assets (c).]

259. If a partner, without the knowledge and consent of the other partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby.

[Where one partner carries on a business which competes or interferes with the firm's business, he must not only account for the profits so made, but also make compensation for loss occasioned by his rival trading. The notion of a trade-partnership obviously excludes the idea of any member of it being allowed to

(a) *Foster v. Oxford, Worcester & Wolverhampton Ry. Co.*, 13 C. B., 200.

(b) *Gardner v. McCutcheon*, 4 Beav., 534; *Clegg v. Fishwick*, 1 Mac. & G., 294; *Clegg v. Edmondson*, 8 De G. M. & G., 787.

(c) *Featherstonhaugh v. Fenwick*, 17 Ves., 298.

carry on a business which in any way comes into competition with it. Thus, where plaintiff and defendant became partners for the purpose of carrying out a Government contract, and afterwards the defendant entered into a secret agreement with other parties for the purpose of carrying out a similar contract, a decree was made in favor of the plaintiff, who claimed a share in the profits made by the defendant under the secret agreement (a).

The right to an account under this Section depends on the matter complained of being transacted without the knowledge and consent of the other party. Acquiescence on his part will disentitle him to relief.]

260. A continuing guarantee, given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, such guarantee was given.

[A change in the constitution of a firm, whether it is creditor or debtor with regard to the guaranteed matter, alters the risk of the surety; and he is, therefore, released. This Section is taken from 19 & 20 Vic., c. 97, the fourth Section of which enacts that "no promise to answer for the debt, default or miscarriage of another, made to a firm consisting of two or more persons, or to a single person trading under the name of a firm, and no promise to answer for the debt, &c., of a firm consisting of two or more persons, or of a single person trading under the name of a firm, shall be binding on the person making such promise in respect of anything done or omitted to be done after a change shall have taken place in any one or more of the persons constituting the firm, or in the person trading under the name of a firm, unless the intention of the parties that such promise shall continue to be binding notwithstanding such change, shall appear either by express stipulation or by necessary

(a) *Lock v. Lynam*, 4 Ir. Cas., 188.

implication from the nature of the firm, or otherwise." This section of the Statute is simply declaratory of the Common law, for, previously to its passing, it was held that, where a guarantee was given for several persons or to several persons, it would not be binding after the death or retirement of any one of them, and would not enure for the benefit of the survivors of them (a). The introduction of a new partner has a similar effect on the surety's liability (b). If, however, the guarantee were given to or for persons described as a class or firm, it seems that the security would be held valid after a change in the constitution of the class (c), for then it is to be inferred that the surety intended to bind himself in favor of, or with regard to, a fluctuating body of persons.]

261. The estate of a partner who has died is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm after his death.

Non-liability of deceased partner's estate for subsequent obligations.

[The death of a partner dissolves the firm, and, therefore, puts an end to the authority given to each member to act for the other. In respect of obligations incurred before his death, the estate of the deceased partner remains liable, as does that of any other promisor. The rule of survivorship does not obtain between partners; but the survivors are entitled to have the partnership-debts liquidated, and to charge the estate of the deceased with his share. For instance, the benefit and the liability of a joint contract belong to the surviving partners and the representatives of the deceased. "The general rule is, that the interest which the testator had in a chose in action jointly with another, shall not pass to his executor: yet *per legem mercatoriam*, as formerly mentioned, an exception was established in favor of merchants, which has been extended to all traders, and persons engaged in joint undertakings in the nature of trade. But in these cases, although the right of the deceased partner devolves

(a) *University of Cambridge v. Baldwin*, 5 M. & W., 580; *Chapman v. Beckington*, 3 Q. B., 703.

(b) Add. on Cont., 562; *Pease v. Hirst*, 10 B. & C., at p. 125; *Kipling v. Turner*, 5 B. & A., at p. 262.

(c) *Wright v. Russell*, 2 W. Bl., at p. 935, n. (b).

on his executor, it is now fully settled that the remedy survives to his companion, who alone must enforce the right by action, and will be liable, on recovery, to account to the executor or administrator for the share of the deceased" (a).

The executors are accordingly entitled to have their share of the profit arising out of the joint contract to which their testator was a party (b). On the other hand, the creditors of the firm can also proceed against the estate of the deceased partner, subject, however, to the provision stated in the following section, that his separate estate is primarily liable to his separate creditors. There was, formerly, some doubt whether a creditor could adopt this course without first having recourse to the surviving partners; but it is now settled that he can; he must, however, make the surviving partners parties to the suit (c). If a suit has already been instituted for the administration of the deceased's estate, a creditor of the firm can go in and prove against it (d). As the death of a partner of itself works a dissolution, the estate of the deceased partner does not become liable for debts incurred by the continuing partners, merely because no notice of dissolution is given (e). If the representatives of the deceased carry on the business, they incur a personal liability on contracts entered into after his death; but if they do so by the direction of the deceased, they will be entitled to an indemnity out of his estate, and so much of his estate as he has devoted to the business will, it seems, become liable to persons who become creditors after his death (f). Such creditors, however, are not allowed to compete with his other creditors (g). The mere fact of assets of the deceased remaining in the business and payments being made to the representatives in respect of them, does not necessarily constitute them partners (h). If the survivor carries on the business with the capital of the deceased, the

(a) Williams on Executors, 789.

(b) McClean v. Kennard, L. R., 9 Ch., 336.

(c) Wilkinson v. Henderson, 1 M. & K., 582; Devaynes v. Noble, 1 Mer., 575; Seton on Decrees, 550; Vulliamy v. Noble, 3 Mer., at p. 619.

(d) Cowell v. Sikes, 2 Russ., 191.

(e) Vulliamy v. Noble, 3 Mer., at p. 614.

(f) *Ex parte* Garland, 10 Ves., 110.

(g) Cutbush v. Cutbush, 1 Beav., 184.

(h) Holme v. Hammond, L. R., 7 Ex., 218.

division of profits will be governed by considerations of the source of profit, the nature of the business, and the other circumstance of the case (*a*). The estate of a deceased partner may be discharged from liability in the same manner as a retiring partner. Thus, if a creditor lies by and allows the estate to be administered without making any claim, the Court will not assist him in a resort to the assets of the deceased (*b*).]

262. Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership-property must be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

[This Section lays down the rules which are to be observed in the distribution of assets, in whatever mode the partnership may be dissolved. The rule that the partnership-property must be applied first to the payment of the partnership-debts, is for the benefit, as well of the members, as of the creditors of the firm. Upon dissolution each partner has a lien on the joint property of the firm for the purpose of having it applied in discharge of the joint debts, and upon the surplus for the purpose of having it applied in payment of what may be due to the partners respectively. "In no one of those cases" said Lord Eldon, "can it be said, that to all intents and purposes the partnership is dissolved; for the connection still remains until the affairs are wound-up. The representative of a deceased partner, or the assignees of a bankrupt-partner, are not strictly partners with the survivor, or the solvent partner: but still in

(*a*) Willett v. Blanford, 1 Hare, 253.

(*b*) Oakeley v. Pasheller, 4 Cl. & F., 207; Robinson v. Alexander, 2 Cl. & F., 717.

either of those cases that community of interest remains, that is necessary, until the affairs are wound-up: and that requires, that what was partnership-property before shall continue, for the purpose of a distribution, not as the rights of the creditors, but as the rights of the partners themselves, require: and it is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity" (a). The partnership-property affected by this Section is that property which belonged to the firm at the time of its dissolution. It includes all that was, at the commencement of the partnership, thrown into the common stock, and whatever has, during its continuance, by means thereof, been added to it. Separate property is that in which the partners are separately interested at the time of the dissolution. Property, therefore, which has been acquired in the partnership after its dissolution is not to be treated as partnership-property; and that which, though originally partnership-property, has by virtue of a *bond fide* agreement been converted into separate property before the dissolution, cannot be claimed by joint creditors as partnership-property. Separate property may similarly be converted into joint property; but the agreement by which the conversion is effected must, in any case, be completely executed and must be in good faith (b).

The lien of a partner on partnership-assets exists against his co-partners and all persons claiming through them (c); and, similarly, the creditor's right may be exercised against the representatives of a deceased partner. The reason of the rule stated in the Section is thus given by Lord Hardwicke. "Joint creditors, as they gave credit to the joint estate, have first their demand on the joint estate, and separate creditors, as they gave credit to the separate estate, have first their demand on the separate estate" (d). Although the reason of the rule has been frequently condemned as artificial, the doctrine has been

(a) *Ex parte Williams*, 11 Ves., at p. 4. See also *Knox v. Gye*, L. R., 5 H. L., 656, in which case the Lord Chancellor and Lord Westbury differed as to whether there is a fiduciary relation between a surviving partner and the representatives of his deceased partner.

(b) *Ex parte Owen*, 4 De G. & Sm., 351; *Ex parte Rowlandson*, 1 Rose, 89.

(c) *Re Langmeads Trusts*, 20 Beav., 20.

(d) *Twiss v. Massey*, 1 Atk., 67.

applied in all cases where deficiency of assets has made its application necessary (a).]

263. After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding-up the business of the partnership.

Continuance of
partners' rights
and obligations
after dissolution.

[The authority of each partner to bind the firm by contracts, such as were originally contemplated by the partnership, ceases on its dissolution: but certain powers still belong to them for the purpose of giving effect to the rights which the preceding Section reserves to them. "The general law" it has been said, "is clear, that a partnership, though dissolved, continues for the purpose of winding-up its affairs. Each partner has, after and notwithstanding the dissolution, full authority to receive and pay money on account of the partnership, and has the same authority to deal with the property of the partnership, for partnership-purposes, as he had during the continuance of the partnership. This must necessarily be so. If it were not, at the instant of the dissolution, it would be necessary to apply to this Court for a receiver in every case, although the partners did not differ on any one item of the account"(b). The accounts must be kept open for the purpose of debiting and crediting the proper parties with the monies payable by or to them in respect of matters incidental to the winding up as well as in respect of old transactions (c). The representatives of a deceased partner are entitled to have the partnership property sold (d); but they are not entitled to interfere with the surviving partner in the winding-up. If any partner exceeds his powers or misconducts himself in the winding-up, the Court will restrain him, or, if necessary, will exclude all the parties from management of the business (e). The Court is

(a) *Ridgway v. Clare*, 19 Beav., 111.

(b) *Butchart v. Dresser*, 4 De G. M. & G., at p. 544.

(c) *Willett v. Blanford*, 1 Hare, 253.

(d) *Crawshay v. Maule*, 1 Swanst., 495.

(e) *Hall v. Hall*, 3 Mac. & G., at p. 86; *Crawshay v. Collins*, 15 Ves., 218.

reluctant to exclude the partners themselves and appoint a receiver; and a receiver is not, therefore, except on special grounds, appointed, when the firm consisted of several members. The proper course in such a case is for those who complain of the conduct of an individual partner to proceed against him by injunction only. The Court has interfered by appointing a receiver in the following cases: where a partner colluded with the firm's debtors (*a*); where one carried on a separate trade with the joint property (*b*); where a surviving partner insisted on carrying on the business and risking the assets of the deceased partner (*c*); where there is such mismanagement as to endanger the whole concern (*d*); where those having the control of the assets made away with them (*e*).

The appointment of a receiver excludes all the parties from taking any part in the business of winding-up. The receiver is an officer of the Court, and, therefore, interference with him or the property under his charge amounts to a contempt of Court (*f*).]

264. Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution.

Notice of dissolution.

[A person who has ceased to be member of a firm can be liable on its fresh contracts only on the ground that the existing members are clothed with an ostensible authority to act on his behalf: where the person sought to be made liable has been a dormant partner, no ostensible authority has ever existed: where notice of dissolution has been received, or publicly given, the ostensible authority has ceased to exist. The question of notice, therefore, only becomes important, when the person sued was

(*a*) *Estwick v. Conningsby*, 1 Vern., 118.

(*b*) *Harding v. Glover*, 18 Ves., 281.

(*c*) *Madgwick v. Wimple*, 6 Beav., 495.

(*d*) *De Tastet v. Bordieu*, 2 Bro. C. C., note to *Phillips v. Atkinson*, 272.

(*e*) *Evans v. Coventry*, 5 De G. M. & G., 911.

(*f*) *Lane v. Sterne*, 3 Giff., 629.

a known partner of the firm. An advertisement is the usual mode of giving notice; but a change in the name of the firm appearing on the door, or on the face of cheques of a firm, has been held sufficient (a). Proper notice having been given, an ex-partner does not continue liable simply because a copartner continues to carry on the same business in the old name (b.) See notes to Sections 245 and 246. According to the English cases, notice given generally, as by advertisement, does not affect old customers, unless it can be brought to their knowledge. This distinction is not recognized in the Section, and the only question which can arise is as to the meaning of the term "public notice."]

265. In the absence of any contract to the contrary, after the termination of a partnership, each partner or his representatives may apply to the Court to wind-up the business of the firm, to provide for the payment of its debts, and to distribute the surplus according to the shares of the partners respectively.

Explanation.—The Court in this section means a Court not inferior to the Court of a District Judge within the local limits of whose jurisdiction the place or principal place of business of the firm is situated.

[From the first words of this Section it would seem that a contract restricting members of a firm from applying to the Court for the purpose of having the business wound-up is legal within the meaning of the Exceptions to Section 28.

A suit for dissolution is the process by which the assistance of the Court in the winding-up is obtained. All the partners or their representatives must be made parties to it (c).]

(a) *M'Iver v. Humble*, 16 East., 169; *Barfoot v. Goodall*, 3 Camp., at p. 149.

(b) *Newsome v. Coles*, 2 Camp., 617.

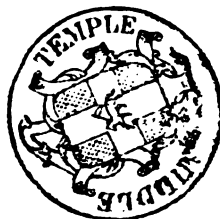
(c) *Cox v. Stephens*, 9 Jur., N. S., 1144.

266. Extraordinary partnerships, such as partnerships with limited liability, incorporated partnerships, and joint-stock companies, shall be regulated by the law for the time being in force relating thereto.

Limited liability partnerships, incorporated partnerships, and joint-stock companies.

[This Section guards against the possibility of any of the foregoing Sections being construed as interfering with the provisions of the Indian Companies' Act or the special Acts under which certain Companies have been incorporated.]

SCHEDULE.

Statutes.

No. and year of Statute.	Title.	Extent of repeal.
Stat. 29 Car. 2, cap. 3	An Act for prevention of frauds and perjuries.	Secs. 1, 2, 3, 4 and 17.
Stat. 11 & 12 Vic., cap. 21.	To consolidate and amend the law relating to insolvent debtors in India.	Section 42.

Acts.

No. and year of Act.	Title.	Extent of repeal.
Act XIII of 1840.	An Act for the amendment of the law regarding factors, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Stat. 4 Geo. iv, c. 83, as altered and amended by the Stat. 6 Geo. iv, c. 94.	The whole.
Act XIV of 1840.	An Act for rendering a written memorandum necessary to the validity of certain promises and engagements, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Stat. 9 Geo. iv, cap. 14.	The whole.
Act XX of 1844.	An Act to amend the law relating to advances <i>bonâ fide</i> made to agents intrusted with goods, by extending to the territories of the East India Company, in cases governed by English law, the provisions of the Statute 5 & 6 Victoria, c. 39, as altered by this Act	The whole.
Act XXI of 1848.	An Act for avoiding wagers	The whole.
Act V of 1866	An Act to provide a summary procedure on bills of exchange, and to amend in certain respects the commercial law of British India.	Secs. 9 & 10.
Act XV of 1866.	An Act to amend the law of partnership in India.	The whole.
Act VIII of 1867.	An Act to amend the law relating to horse-racing in India.	The whole.

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